Supreme Court, U.S.
FILED

No. 991079 DEC 27 1999

OFFICE OF THE CLERK

In The

Supreme Court of the United States

URVASHI B. PATEL, an individual,

Petitioner,

v.

OMH MEDICAL CENTER, INC., an Oklahoma corporation, ST. FRANCIS HOSPITAL, INC., an Oklahoma corporation and JOHN B. STEVENS, an individual,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Oklahoma

PETITION FOR WRIT OF CERTIORARI

CLIFFORD N. RIBNER
Counsel of Record
320 South Boston, Suite 1130
Tulsa, OK 74103
(918) 582-9200
Attorney for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

110 pp

QUESTIONS PRESENTED FOR REVIEW

I. Does the principle of *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944) – that once a court determines, as a factual matter, that one of its judgments was obtained, in whole or in part, through the use of attorney-complicit fraud practiced on such court by the prevailing party and its attorney, such court must order the vacation of such judgment for that reason alone, without further inquiry into any other matter (such as whether such fraud was outcome-determinative, the diligence and good faith of the non-prevailing party in investigating and discovering such fraud, laches or statute of limitations) – represent a requirement of constitutional due process in all civil cases, Petitioner's right to which the Oklahoma Supreme Court violated by ordering the reversal of the trial court's order vacating a judgment favorable to Respondents obtained through the use of such attorney-complicit fraud practiced by them on the Petitioner, on such trial court and on the jury in this case?

II. Was Petitioner deprived of her Constitutional right to procedural due process when the Oklahoma Supreme Court ruled that the Trial Court's undisturbed finding that Respondents had obtained a judgment adverse to certain of Petitioner's claims against them through the use of knowing fraud, effected with the active complicity of their attorneys, which deceived such Trial Court judge herself, the Petitioner and the jury, was an insufficient basis for such judge to vacate such judgment, and that in order to vacate such, Petitioner bore the *additional* burden of proving each of the following: (1) Show that she acted

QUESTIONS PRESENTED FOR REVIEW – Continued

without delay in asserting her rights after discovering the fraud, (2) establish that she used diligence in the original action in trying to discover and expose the fraud, and (3) demonstrate that there is a substantial likelihood that a new trial will have a different result?

III. Did the Oklahoma Supreme Court violate Petitioner's constitutional right to procedural due process in ruling that Respondents may be allowed to retain the fruits of a judgment adverse to Petitioner's claims against them obtained by them through fraud, in which fraud Respondents' attorney was actively and knowingly complicit, *solely* because such fraud, and its continuing concealment by Respondents and their attorneys, were not discovered and proven by Petitioner until after the earlier judgment became final, whereas such attorney-complicit fraud would have been sufficient, according to the Oklahoma Supreme Court, to permit the imposition of extreme sanctions, including the entry of default judgment against Respondents, had it been discovered by Petitioner prior thereto?

PARTIES TO THE PROCEEDING

Petitioner, Urvashi B. Patel was the Plaintiff and the Appellee in the Courts below.

Respondents, OMH Medical Center, Inc., St. Francis Hospital, Inc., and John B. Stevens were the Defendants and the Appellants in the Courts below.

There are no other parties to this action.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vi

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

A. Proceedings Below 5

1. "Patel I" 5

2. Commencement of This Case – "Patel II" 5

3. "Patel III" 7

4. The Trial Court Decision in This Case 8

5. The Oklahoma Supreme Court's Decision .. 9

6. Petitioner's Hazel-Atlas Arguments to the Oklahoma Courts. 11

7. Petitioner's Due Process Arguments in the Oklahoma Supreme Court 18

REASONS FOR GRANTING THE WRIT 25

TABLE OF CONTENTS – Continued

Page

I. PETITIONER HAS BEEN DEPRIVED OF HER RIGHT TO PROCEDURAL DUE PROCESS OF LAW BY THE OKLAHOMA SUPREME COURT'S REFUSAL TO PERMIT THE TRIAL COURT TO VACATE ITS EARLIER JUDGMENT ADVERSE TO PETITIONER'S CLAIMS AGAINST RESPONDENTS NOTWITHSTANDING THE TRIAL COURT'S UNDISTURBED FINDING OF ATTORNEY-COMPLICIT FRAUD ENGAGED IN BY RESPONDENTS IN OBTAINING SUCH JUDGMENT AND RESPONDENTS' INABILITY TO PROVE THE IMMATERIALITY OF SUCH FRAUD..... 26

II. THIS CASE IS OF CRITICAL IMPORTANCE TO THE ADMINISTRATION OF JUSTICE.... 28

CONCLUSION 30

Appendix A Opinion of the Supreme Court of the State of Oklahoma, dated April 27, 1999 ..... 1a

Appendix B Order on Plaintiff's Petition to Vacate Judgment in Part, filed in the District Court in and for Tulsa County, Oklahoma on November 14, 1997 ..... 44a

Appendix C Order of the Supreme Court of the State of Oklahoma denying Petition for Rehearing, filed September 30, 1999 ..... 49a

Appendix D Plaintiff Dr. Patel's Petition for Rehearing and Brief in Support, filed May 17, 1999..... 50a

TABLE OF AUTHORITIES

Page

CASES

Abernathy v. Huston, 26 P.2d 939, 166 Okla. 184 (1933) 14, 24

Amchem Products, Inc., v. Windsor, 521 U.S. 591 (1997) 28

ASARCO, Inc. v. Kadish, 490 U.S. 605 (1989) 2

Averbach v. Rival Manufacturing Co., 809 F.2d 1016 (3rd Cir. 1987) 25

Brady v. Maryland, 373 U.S. 83 (1963) 2

Brinkerhoff-Farris Trust & Savings Co. v. Hill, 281 U.S. 673 (1930) 25

Brown v. Borg, 951 F.2d 1011 (9th Cir. 1991) .. 19, 20, 22

Browning v. Navarro v. Holloway, 826 F.2d 335 (5th Cir. 1987) 25

Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) 11, 19, 20, 22, 26, 27

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) 2

Dausuel v. Dausuel, 195 F.2d 774 (D.C. Cir. 1952) 25

Fay v. Noia, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963) 19

Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238 (1944) ..... *passim*

Holm-Waddle v. Hawley, 1998 OK 53 23

In re: Intermagnetics America, Inc., et al. v. China International Trust and Investment Corporation, 926 F.2d 912 (9th Cir. 1991) 25

TABLE OF AUTHORITIES – Continued

Page

Kupferman v. Consolidated Research and Manufacturing Corporation, 459 F.2d 1072 (2nd Cir. 1972) 25

Leber-Krebs, Inc. v. Capitol Records, 779 F.2d 895 (2nd Cir. 1985) 25

Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach, 118 S.Ct. 956 (1998) 28

Local No. 438 Construction and General Laborers' AFL-CIO v. Curry, 371 U.S. 542 (1963)..... 2

Mercantile National Bank v. Langeau, 371 U.S. 555 (1963) 2

Miranda v. Arizona, 384 U.S. 436 (1966)..... 2

Mock v. Stricklin, 315 P.2d 247 (Okla. 1957)..... 23

O'Neal v. McAninch, 513 U.S. 432, 115 S.Ct. 992, 130 L.Ed.2d 947 (1995)..... 21

Ortiz v. Fibreboard Corp., 119 S.Ct. 2295 (1999)..... 28

Patel v. OMH, 1999 OK 33 1

Peralta v. Heights Medical Center, Inc., 485 U.S. 80, 108 S.Ct. 896, 99 L.Ed.2d 75 (1988)..... 18, 19, 26, 28

Pennoyer v. Neff, 95 U.S. 714 (1878)..... 19

PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980) 24

Publicker v. Shallcross, 106 F.2d 949 (3rd Cir. 1939) 25

Pumphrey v. K.W. Thompson Tool Co., 62 F.3d 1128 (9th Cir. 1995)..... 17, 25

Richards v. Jefferson Co., Ala., 517 U.S. 793 (1996) 24, 25, 26, 28

TABLE OF AUTHORITIES – Continued

Page

State Ex Rel. Commissioners of Land Office v. Jones, 198 Okla. 1987, 176 P.2d 992 (1947) 24

Sutter v. Easterly, 189 S.W.2d 284, 354 Mo.282 (Mo. 1945) 12, 25

Toscano v. Commissioner of Internal Revenue, 441 F.2d 930 (9th Cir. 1971) 25

CONSTITUTION

U.S. Constitution, Amendment V 2

U.S. Constitution, Amendment XIV 3

STATUTES

28 U.S.C. §1257(a) 1, 2

Title 12 Okla. Stat. 1984 §2012(B)(6) 8

FEDERAL RULES OF CIVIL PROCEDURE

Rule 12(b)(6) of the Federal Rules of Civil Procedure 8

Rule 60(b) of the Federal Rules of Civil Procedure 11

PETITION FOR WRIT OF CERTIORARI

Dr. Urvashi B. Patel petitions this Court for a Writ of Certiorari to review the decision of the Supreme Court of the State of Oklahoma.

OPINIONS BELOW

The Oklahoma Supreme Court's Opinion below (Pet. App. 1a-43a) is officially reported online at http://www.oscn.net, 1999 OK 33, and will be officially reported at ___ P.2d ___ (Okla. 1999). In that Opinion the Oklahoma Supreme Court reversed the unreported decision of the Tulsa County District Court (Pet. App. 44a-48a).

STATEMENT OF JURISDICTION

The decision of the Oklahoma Supreme Court was entered on April 27, 1999. Petitioner's timely-filed Petition for Hearing and Brief in Support (Pet. App. 50a-71a) was denied by Order entered on September 30, 1999 (Pet. App. 49a), over two justices' dissents. Jurisdiction lies under 28 U.S.C. §1257(a) for this Court to review the final decision of the Oklahoma Supreme Court.[1]

---

[1] The Trial Court in this case granted Petitioner's Petition to Vacate the portion of an earlier judgment from her Court adverse to Petitioner's original tort claims against Respondents, based on Respondents' attorney-complicit fraud in obtaining such judgment, as required by *Hazel-Atlas Glass Co. v. Hartford Empire Co.*, 322 U.S. 238 (1944), and prior Oklahoma Supreme

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitution, Amendment V provides as follows:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in

---

Court decisions which were substantially in accord with *Hazel-Atlas*. In its Opinion, review of which is sought herein, the Oklahoma Supreme Court reversed such ruling by the trial court based on its determination that such attorney-complicit fraud alone is insufficient grounds for vacating any judgment, requiring the trial court on remand to make additional findings of fact before doing so. Had the Oklahoma Supreme Court correctly affirmed the trial court's decision in this case such would undeniably have been a "final decision" and it is equally clear that reversal of such decision by this Court, consistent with applicable federal law, will make such further trial court proceedings unnecessary. In short, the constitutional due process rights asserted by Petitioner in this action are "too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.[citations omitted]" *Local No. 438 Construction and General Laborers' AFL-CIO v. Curry*, 371 U.S. 542 (1963). See also *Mercantile National Bank v. Langeau*, 371 U.S. 555 (1963); *Brady v. Maryland*, 373 U.S. 83 (1963); *Miranda v. Arizona*, 384 U.S. 436 (1966). Accordingly, the Oklahoma Supreme Court's decision is clearly "final" for purposes of 28 U.S.C. §1257 because the federal question decided therein is conclusive and there would be no federal question before the trial court on remand. *ASARCO, Inc. v. Kadish*, 490 U.S. 605 (1989), following *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) ("[Appellants] may prevail at trial [on remand] on non-federal grounds, it is true, but if the Georgia court erroneously upheld the statutes there should be no trial at all. . . . Delaying final decision of [the federal] claims until after trial will 'leave unanswered . . . an important [federal] question . . . ' " 420 U.S. at 485-486). Such is precisely the case here.

> the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

U.S. Constitution, Amendment XIV, Section I, provides as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Correctly applying controlling precedents of this Court, previously followed by all other American courts including the Supreme Court of Oklahoma, the Trial Court in this case ordered the vacation of a judgment favorable to Respondents which had dismissed tort claims Petitioner had previously made against them, based on the Trial Court's determination that such judgment had been obtained by Respondents through knowing, attorney-complicit fraud on her, on Petitioner and on

the jury. Without even so much as mentioning the directly contrary, controlling precedents of this Court and of every other American jurisdiction including Oklahoma, the Oklahoma Supreme Court reversed the Trial Court, without disturbing her fact finding of attorney-complicit fraud in this case, ruling it an abuse of the Trial Court's discretion to set aside a final judgment on that basis.

The Oklahoma Supreme Court ruled that consequences of such attorney-complicit fraud to the defrauding party vary significantly depending on whether such fraud is discovered before or after a judgment becomes final: It acknowledged that sanctions of the most extreme kind may be imposed at the discretion of the Trial Court for such fraud discovered prior to a judgment's finality, but that for attorney-complicit fraud discovered by the defrauded party – that is, successfully concealed by the defrauding party and its attorneys until – after a judgment becomes final, vacation of such judgment is permissible only after the defrauded party has also proven numerous additional matters beyond the fact of the attorney-complicit fraud – such as the defrauded party's particular diligence in attempting to discover and expose the fraud and the outcome-determinativeness of the fraud in the original trial.

This Court, and every other American court which has ruled on the question, has long held attorney-complicit fraud alone requires vacation of a judgment obtained therewith, without regard to any such other matters. Such rulings have served to prevent precisely the repugnant result demanded by the Oklahoma Supreme Court in this case – rewarding corruption of the judicial process in Oklahoma by permitting a party to retain the

fruits of attorney-complicit fraud, thereby permitting the claimed virtue of finality to trump the demands of due process.

A. Proceedings Below.

1. "Patel I."

Petitioner originally sued Respondent OMH Medical Center, Inc. ("OMH") for breach of contract, and Respondents OMH, St. Francis Hospital and John B. Stevens, jointly, for various intentional torts, arising out of those Respondents' attempted extortion against Petitioner (those Respondents threatened to ruin Petitioner's medical career if she refused to waive a $50,000 fee to which she was legally entitled, and to foster such career if she agreed to such waiver. Petitioner possesses taped recordings of conversations between herself and Respondents containing such extortion by Respondents and Respondents admitted all such facts at trial.) ("Patel I") A jury trial of both such claims was held before the Honorable Jane P. Wiseman in February, 1995, resulting in a verdict for Petitioner on her contract claim and for Respondents on her tort claims. Such verdict was appealed by both parties to the Oklahoma Court of Civil Appeals and in all respects affirmed. The Oklahoma Supreme Court denied Petitioner's Petition for Certiorari review and so such judgment became final.

2. Commencement of This Case – "Patel II."

At the time the Patel I judgment became final, Petitioner had reason to believe, but no evidence supporting

such belief, that Respondents had obtained their judgment adverse to her tort claims based on attorney-complicit fraud practiced on her and on the Trial Judge. On October 1, 1996, Petitioner commenced this case by filing her verified Petition to Vacate the portion of the judgment adverse to her tort claims against Respondents ("Patel II"), pursuant to Tit. 12 Okla. Stat. 1991 §1031 (Fourth), which statute expressly empowers Oklahoma District Courts to vacate and modify their own judgments "for fraud, practiced by the successful party, in obtaining a judgment or order" (the "Petition to Vacate").

In such Petition to Vacate, Petitioner alleged, then on information and belief, that Respondents had obtained the judgment adverse to her tort claims by obtaining the admittance of a highly material, and extremely damaging, document solely by making, through their lawyers, various material, fraudulent representations to the Trial Court on which representations the Trial Court relied in admitting such document. While conducting discovery incident to such Petition to Vacate, Petitioner obtained evidence unambiguously proving that such belief in Respondents' fraud was accurate and evidentiary proof of additional material frauds also committed by Respondents, also with the active participation of their attorneys, showing they had committed serious discovery fraud one year prior to trial and that literally the entire case they presented to the jury was one of fraud, falsified and despoiled documents and perjury. Petitioner moved to amend her Petition to Vacate to add such additional claims.

Following exhaustive briefing and evidentiary submissions, a full and complete hearing was held in this

case[2] and on November 14, 1997, Judge Wiseman issued her Order granting Plaintiff's Petition to Vacate (Pet. App. 44a-48a), based on Petitioner's having proven the allegations contained therein with Judge Wiseman ruling Petitioner's Motion to Amend such Petition to add additional allegations moot since the original allegations were more than sufficient.

3. "Patel III."

In June, 1997, prior to Judge Wiseman rendering her Order in this case, and simultaneous with Petitioner filing her motion to amend the pleadings in this case, Petitioner filed a third pleading (styled a Petition under Oklahoma law), in Tulsa County District Court naming both Respondents and their attorneys in this case – Larry D. Henry and his law firm Arrington, Kihle, Gaberino & Dunn – as Defendants and seeking actual and punitive money damages from such Defendants attributable to their destruction of Petitioner's original lawsuit against them through the use of their knowing deceit on Petitioner, Judge

---

[2] At the close of such March 27, 1997, hearing, consisting of uninterrupted presentations by all parties to Judge Wiseman, Judge Wiseman specifically addressed Respondents stating: "Miss Hale [Respondents' attorney present at such hearing, along with Mr. Henry who was also present], was there anything further in regard to the matters that were presented?" (Transcript, March 27 hearing, pp. 20-21) and, as if that were not enough, Judge Wiseman asked, "Were there any other submissions? I am assuming that *the case* may stand as submitted.[emphases added]" Respondents suggested nothing to Judge Wiseman to indicate otherwise. (Transcript, March 27 hearing, pp. 26-28)

Wiseman and the jury, their fabrication of false and despoiled evidence and perjury all effected with attorney complicity, on all of which Petitioner reasonably relied at trial ("Patel III"). Judge Peterson, the Trial Judge in Patel III, granted the motion of the Defendants therein to dismiss such claims pursuant to Tit. 12 Okla. Stat. 1984 §2012(B)(6) (Substantially identical to Rule 12(b)(6) of the Federal Rules of Civil Procedure and applied by the Oklahoma courts identically to such federal Rule. *See* Official Committee Comment to [Tit. 12 Okla. Stat.] §2012; *Hall v. Goodwin*, 775 P.2d 291, 293 (Okla. 1989).) Petitioner filed an appeal from Judge Peterson's ruling dismissing her claims in Patel III to the Oklahoma Supreme Court which, on Petitioner's Motion to do so, retained jurisdiction over such appeal, by-passing Oklahoma's usual appellate procedures pursuant to which the Oklahoma Court of Appeals would have heard such appeal in the first instance, reviewable by the Oklahoma Supreme Court only subject to its discretionary certiorari jurisdiction.

4. The Trial Court Decision in This Case.

In Judge Wiseman's November 14, 1997, Order, in this case (Pet. App. 44a-48a) she, who had been the trial judge in this case since its inception in 1993, made the following, detailed findings of fact: that Respondents, through their lawyer, Larry D. Henry, made materially false representations at trial to Judge Wiseman herself and to Petitioner, they did so with full knowledge of the actual facts and the material effect their misrepresentations would have; such misrepresentations themselves involved the fraudulent concealment of relevant, requested – by both Petitioner and the Trial Court – documents, and knowingly false

statements about a trial exhibit offered by Respondents; Judge Wiseman relied on such false statements in making certain rulings at trial and in admitting such exhibit which resulted in the jury being materially misled "on the exact point on which Mr. Henry [Respondents' attorney] offered [such exhibit]." (Pet. App. 47a) Respondents appealed such Order to the Oklahoma Supreme Court which also retained such appeal.

5. The Oklahoma Supreme Court's Decision.

On April 27, 1999, the Oklahoma Supreme Court filed a single Opinion in which it announced its ruling both in this case and in Patel III, without formally consolidating such cases. Such Opinion affirmed Judge Peterson's Order dismissing Petitioner's claims in Patel III and reversed Judge Wiseman's Order Granting Petitioner's Petition to Vacate in the present case. Petitioner filed Petitions for Rehearing for both such decisions in the Oklahoma Supreme Court, both which Petitions for Rehearing were denied, over two dissents. On even date herewith, Petitioner is also filing a Petition for Writ of Certiorari to the Supreme Court of Oklahoma in Patel III, case no. ___, styled *Urvashi B. Patel, an individual vs. OMH Medical Center, Inc., an Oklahoma corporation, St. Francis Hospital, Inc., an Oklahoma corporation, Larry D. Henry, an individual and Arrington, Kihle, Gaberino & Dunn, Inc., Defendants-Appellees,* based on the Oklahoma Supreme Court's violation of Petitioner's right to equal protection of the laws in its ruling in that case.

In its Opinion ordering the reversal and remand of Judge Wiseman's ruling in this case, the Oklahoma

Supreme Court did not even purport to disturb her findings of Respondents' attorney-complicit fraud described above nor did it suggest that Respondents had shown any evidence of, let alone proven, such fraud's immateriality. Instead, it completely ignored the fact of such attorney complicity in Respondents' frauds and ruled that the judgment in Patel I could not be vacated unless the Trial Court also ruled that Petitioner had also proven the following additional facts:

> "(1) that he (or she) acted without delay in asserting his (or her) rights after discovering the fraud, (2) establish that he (or she) used diligence in the original action in trying to discover and expose the fraud . . . and (3) demonstrate that there is a substantial likelihood that a new trial will have a different result." (Pet. App. 32a)[3]

---

[3] The Oklahoma Supreme Court also suggested that due process considerations entitled both Petitioner and Respondents to additional hearings on all such questions since the Court, as it acknowledged itself, was announcing new law in this area in Oklahoma. The Oklahoma Supreme Court acknowledged however, that Respondents were not necessarily entitled to such an additional hearing since the trial judge, as the trier of fact on all germane issues, could determine when she had heard enough, as she already had at the time when she issued the Order the Supreme Court so reversed. Since it is clear that the trial court was herself a witness to the frauds committed by Respondents and their attorneys and to their effect on her, her rulings, Petitioner and the jury, it is clear that the Oklahoma Supreme Court would have viewed her findings as "final" had it applied correct legal principles, consistent with federal constitutional law, and affirmed her decision. Accordingly, it is clear that the sole reason the Oklahoma Supreme Court ordered further trial court proceedings on remand herein is because of

6. Petitioner's *Hazel-Atlas* Arguments to the Oklahoma Courts.

Petitioner first urged the applicability of *Hazel-Atlas Glass Co.* to this case in the Trial Court in her "Plaintiff's Combined Response to Defendants' Motion to Dismiss Plaintiff's Petition to Vacate Portion of Judgment and Brief in Support of Plaintiff's Motion for Summary Judgment", filed November 27, 1996, and contained in the Record on Appeal in this case before the Oklahoma Supreme Court at pages 156 through 260 thereof. She specifically made the following arguments therein shown on Record, pages 168 through 169:

> *"B. The Involvement of Defendants' Attorneys In Defendants' Fraud Makes It Unnecessary For Plaintiff Even to Prove That The Admittance of Defendants' Exhibit 1 Was Outcome-Determinative In Order To Obtain The Relief Sought In Her Petition.*
>
> "Moreover, in the present case, unlike *Sadberry* or *Chisholm*, Defendants' attorneys – officers of the Court – were *actively involved* in perpetrating the fraud upon the Court. In 1944, *four years before the present version* of Rule 60(b) of the Federal Rules of Civil Procedure permitting vacation of judgment for fraud without regard to its intrinsic or extrinsic nature was promulgated, the United States Supreme Court ruled that courts have an inherent power and *duty* to deny parties from benefitting in any manner from such frauds perpetrated with the

---

its erroneous indifference to what due process mandates in these circumstances.

active collaboration of their attorneys. *Hazel-Atlas Glass Co. v. Hartford Empire Co.*, 322 U.S. 238, 64 S. Ct. 997, 88 L. Ed. 1250 (1944) (involvement of attorney in plan to fabricate false evidence in support of validity of a patent becomes fraud on the court, inherently voidable.) In *Hazel-Atlas*, the defrauding party's attorney was involved in creating a phony treatise-type article published in anticipation of its use as a treatise at subsequent litigation. Because of his active involvement in such, the Supreme Court ruled the judgment therein voidable, without regard to any statute of limitations, without regard to whether the injured party exercised proper *diligence* in uncovering the fraud and without regard to the effect of the false evidence on the trier of fact.

"The defrauding activities of Defendants' lawyers in the present case are at least as egregious as those involved in *Hazel-Atlas*. Here, when *specifically questioned* whether they were producing a complete document, Defendants' attorneys asserted that they were in fact doing so, thereby denying the fact of their spoliation. Moreover, Mr. Henry directly lied to the Court concerning Plaintiff's file and concerning specific questions about it posed to him by the Court. See also *Sutter v. Easterly*, 189 S.W.2d 284, 354 Mo. 282 (Mo. 1945) (attorney engaged in conspiracy to produce fabricated evidence results in voidable fraud on the court, pursuant to *Hazel-Atlas*.)

"Here there can be no question of Defendants' lawyers active participation in the fraud on the court, which fraud continues to this very day by virtue of their explicit *denials* – in their

> Motion and their Answer – that they committed *any* such fraud in the original proceeding. Under such circumstance, even if, *arguendo*, the Court were to find any error in the admittance of Defendants' Exhibit 1 without the surrounding, refuting, attached documents, to be harmless, the dismissal of Plaintiff's tort claims is clearly voidable under *Hazel-Atlas* because of the active involvement of Defendants' attorneys in perpetrating the fraud on the court."

Petitioner again relied on *Hazel-Atlas Glass Co.*, on page 9 of her Answer Brief of Plaintiff/Appellee Urvashi B. Patel, filed in the Oklahoma Supreme Court on March 5, 1999, at page 9 thereof, as follows, in commenting on the substance of the allegations contained in Petitioner's pleadings commencing this ("Patel II") action which the Trial Court had found sufficient to grant the relief requested therein – that is vacation of judgment:

> "The Petition clearly alleges the facts of Defendants' and Mr. Henry's fraudulent representations, and the material fraudulent concealment necessarily involved therein, which the Trial Court, in the Order, expressly found in *fact occurred*. The Petition further states, on information and belief, that such concealments and misrepresentations were made willfully, or with at least reckless disregard, and resulted in probably outcome-determinative fraud on the trial court herself and on the jury. There can be no doubt that under the clear, long-standing law of both Oklahoma and the United States, such allegations are more than sufficient to state a cause of action pursuant to [12 O.S.] §1031(4). *Hazel-Atlas Glass Co. v. Hartford Empire Co.*, 322 U.S.

> 238, 64 S. Ct. 997, 88 L. Ed. 1250 (1944) (involvement of attorney in plan to fabricate false evidence becomes fraud on the court, inherently voidable) . . . "

In her Petition for Rehearing in this case, Petitioner further alleged the applicability of *Hazel-Atlas Glass Co.*, to the Oklahoma Supreme Court as follows:

> "Nowhere in its Opinion does this [the Oklahoma Supreme] Court even suggest that any significance should be ascribed to the fact that here the fraud was perpetrated not simply by a party alone, nor even by a testifying witness, but rather by parties *with the active complicity of their attorneys*. In requiring the Trial Court to consider whether Plaintiff and her counsel exercised sufficient due diligence in investigating such fraud, the Court effectively imposes a new *duty of investigation* of opposing counsel. Additionally, the Court effectively eviscerates any duty on Mr. Henry's and his law firm's part to Plaintiff or the Court *to disclose* either their misstatements or the fact that such misstatements had occurred.
>
> "All such results have long been *absolutely prohibited* by both this Court and the United States Supreme Court. *Abernathy v. Huston,* [166 Okla. 184, 26 P.2d 939 (1933)] *supra; Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, supra (involvement of attorney in plan to fabricate false evidence becomes fraud on the court, *inherently voidable* without regard to statutes of limitations, laches, defrauded party's diligence in uncovering the fraud and without regard to the materiality of the fraud).

"In *Hazel-Atlas*, the defrauding party's attorney was involved in creating and publishing a phony article which was misleadingly used by his clients in subsequent litigation. *Solely* because of the attorney's active involvement in such scheme, the Supreme Court ruled, directly contrary to this Court, that the judgment therein was inherently voidable. The Court *expressly precluded any* obligation by the defrauded party to make *any* further showing to obtain relief from the judgment *beyond* the proof of the lawyer's complicity in the fraud.

"Indeed, in language unmistakably applicable here, the Supreme Court *explicitly rejected* any notion that the moving party should have to prove its due diligence (which, in fact was probably *lacking* in that case), by ruling as follows:

"Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud." 322 U.S. at 246, 64 S. Ct. at 1001.

"The Court went on *specifically to reject* any notion that the moving party needed to prove the outcome-determinativeness of the fraud by stating as follows:

> "But we do not think the circumstances call for such an attempted appraisal. [The defrauding party's] officials and lawyers thought the article material. . . . Having lost their infringement suit in the District Court wherein they did not specifically emphasize the article, they urged the article upon the Circuit Court and prevailed. *They are in no*

> *position now to dispute its effectiveness.*" [emphases added] 822 U.S. at 247, 64 S. Ct. at 1001-1002.

"The Supreme Court could hardly have been clearer in stating that this principle applied *solely* because, like here, of attorney-complicity in the fraud:

> "Every element of the fraud here disclosed demands the exercise of the historic power of equity to set aside fraudulently begotten judgments. This is not simply a case of a judgment obtained with the aid of a witness who, on the basis of after-discovered evidence, is believed possibly to have been guilty of perjury. Here, even if we consider nothing but Hartford's sworn admissions, we find a deliberately planned and carefully executed scheme to defraud not only the patent office but the Circuit Court Of Appeals. . . . Furthermore, *tampering with the administration of justice* in the manner indisputedly shown here involves far more than an injury to a single litigant. It is a wrong against the institution set up to prevent and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. [emphases added]" 322 U.S. at 245-246, 64 S. Ct. at 1001.

"The defrauding activities of Defendants' lawyers in the present case were substantially *more* egregious than those involved in *Hazel-Atlas*.

"Here, when *specifically questioned* whether they were producing a complete document, Defendants' attorneys asserted that they were in

fact doing so, thereby denying the fact of their concealment of the *larger* document out of which such Exhibit was a mere fragment. Moreover, Mr. Henry *directly lied* repeatedly to the Court concerning Plaintiff's file and other, specific questions about it posed to him by the Court. See also *Pumphrey v. K. W. Thompson Tool Co.*, 62 F.3d 1128 (9th Cir. 1995) (Participation by attorney-employee of party in scheme fraudulently to withhold production of damaging evidence in discovery results in inherently voidable fraud on the Court, explicitly following *Hazel-Atlas*).

"Here, there can be no question of Defendants' lawyers' *active participation* in the fraud on the Court, which fraud continues to this very day by virtue of their continued, explicit *denials* that they committed any such fraud in the original proceeding, even in the briefs filed by them, co-authored by Mr. Henry himself, in this very Court. Under such circumstance, even if the Court doubted the importance of the surrounding, refuting, documents attached to Defendants' Exhibit 1 which Mr. Henry lied about, Plaintiff's due diligence in finding out about and pursuing them and any other matter, the judgment dismissing Plaintiff's tort claims is clearly, inherently voidable under *Hazel-Atlas* simply because of the active involvement of Defendants' attorneys in perpetrating the fraud on the Court."

(Pet. App. 52a-55a)

7. Petitioner's Due Process Arguments in the Oklahoma Supreme Court.

Petitioner first relied expressly on the federal due process deficiencies of the Oklahoma Supreme Court's Opinion when she filed her Petition for Rehearing and Brief in Support in the Supreme Court on May 17, 1999 (Pet. App. 50a-71a). In such Petition for Rehearing the Petitioner made the following arguments:

> "Paragraph 38 of the Opinion provides as follows:
>
> > "in order to vacate the earlier judgment, *the petitioner must* (1) show that he (or she) acted without delay in asserting her rights after discovering the fraud, (2) establish that he (or she) used diligence in the original action in trying to discover and expose the fraud (3) provide clear and convincing evidence of the fraud and (4) demonstrate that there is a substantial likelihood that a new trial will have a different result."
>
> "The Court appears to require this identical proof by the defrauded, moving party, regardless whether the fraud is effected by an officer of the Court and regardless of the willfulness of the fraud. Decisions of the United States Supreme Court clearly establish that imposing such burden on Plaintiff to vacate the judgment is greater than the Constitution permits in these circumstances. In short, this is one of those rare cases where, even if this Court *wanted* to impose the extra burdens on a defrauded party mandated by ¶38 of its Opinion, it lacks the power or prerogative to do so under the Due Process Clause of the federal Constitution. *Peralta v.*

Heights Medical Center, Inc., 485 U.S. 80, 108 S. Ct. 896, 99 L. Ed. 2d 75 (1988); *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967); *Brown v. Borg*, 951 F.2d 1011 (9th Cir. 1991), each of which is discussed below.

"Constitutionally-mandated Due Process is accorded a litigant *only* if he is provided both (1) adequate notice, *Pennoyer v. Neff*, 95 U.S. 714 (1878), and (2) an opportunity to be heard, *Fay v. Noia*, 372 U.S. 391, 83 S. Ct. 822, 9 L. Ed. 2d 837 (1963). The absence of either of these attributes results in a judicial process whose integrity is so tainted that a state simply has no valid interest in the finality of any judgment obtained thereby and *may not* interpose even the most minimal, sensible-appearing requirements for a party to meet in order to set such a judgment aside, once the lack of integrity of the procedures which gave rise to it is itself, as here, established. *Peralta v. Heights Medical Center, Inc.*, supra.

"*Peralta* involved a final judgment which had been obtained in Texas without sufficient constitutionally-required notice to the debtor. Under Texas law, the debtor was required to prove *both* that he would have had a valid defense to the original action, *and* the fact of the judgment's constitutional infirmities, in order to set it aside. The debtor in that case lacked any such defense and, accordingly, the Texas courts refused to vacate the judgment, based on such 'no harm no foul' rule, notwithstanding the judgment's clear constitutional infirmity.

"A unanimous U.S. Supreme Court reversed, ruling that, once the constitutional infirmity *alone* had been proven, '*only* wiping the slate clean . . . would have restored the petitioner to

the position he would have occupied had due process of law been accorded to him in the first place. [citation omitted][emphasis added]'. 485 U.S. at 87, 108 S. Ct. at 900.

"In the present case, Judge Wiseman found that the integrity of Plaintiff's hearing in *her own* Court was tainted due to fraud perpetrated on her *and* Plaintiff by Mr. Henry, an officer of the Court, who knowingly used his status as such to effect such damage. Requiring Plaintiff to prove *more* than the mere fact of such lawyer-perpetrated fraud and the already-adjudicated damage to the original trial's integrity is simply not Constitutionally permissible (although it would be in the usual case of fraud perpetrated by a mere witness, as opposed to an attorney). *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967); *Brown v. Borg*, 951 F.2d 1011 (9th Cir. 1991). These cases clearly require that when a prosecutor – that is, an attorney for the State – commits prosecutorial misconduct even far less egregious than that which Judge Wiseman has already ruled Defendants and Mr. Henry did here, it is the misbehaving – i.e., the *defrauding* – party who bears the burden of proving the *immateriality* to the outcome of his fraud in order to *avoid vacation* of the judgment.

"This rule applies notwithstanding the fact that the *general* burden of proof in habeas corpus proceedings is imposed on the criminal defendant, who must prove the fact of the prosecutor's misconduct *beyond a reasonable doubt*. *Chapman*. Id. Once proven, quite simply, such prosecutorial (i.e. opposing lawyer) misconduct

shifts the burden to the State, as a *minimal* Constitutional requirement, of proving *the immateriality* (that is, the utter *lack* of outcome-determinativeness) of the fraud, *in order to preserve the conviction* obtained against the criminal defendant.

"Of additional note, in such habeas corpus cases, if the State is unable to bear its burden of proving such immateriality, not only is the defendant relieved of any *further* proof to obtain a vacation of his conviction, in the usual case of serious prosecutorial misconduct, such as fraud, the State is *forbidden to reindict* him under the Double Jeopardy clause of the Constitution.

"It is apparent that states have an *even greater* sovereign interest in preserving the finality of such criminal convictions than they do in preserving the finality of judgments in civil cases such as that involved here. Such Due Process requirements apply *equally* and identically in civil, as in criminal, litigation. *See O'Neal v. McAninch*, 513 U.S. 432, 115 S. Ct. 992, 130 L. Ed. 2d 947 (1995). Accordingly, there can be no question but that the remand instructions contained in this Court's ¶38 violate the Due Process Clause of the federal Constitution.

"*Hazel-Atlas* does not specifically discuss what is constitutionally *required* in order to set aside a judgment obtained with attorney-complicit fraud. Instead, it simply dictates what is mandated in the federal system *without regard* to the outer limits of constitutional permissiveness in such matters. As indicated above, prior to this Court's Opinion, *Hazel-Atlas* has been followed

religiously throughout all American jurisdictions in cases involving attorney-complicit fraud.

"Habeas Corpus cases such as *Borg* and *Chapman* address the question not what states simply *ought* to require to permit the vacation of such judgments, but, rather, the outer limits of what the Constitution permits them to do to *avoid* vacation of voidable judgments. *No such cases* permit a state to impose the multiple burdens established by this Court in ¶38 of its Opinion in order for the *moving* party to set aside a final judgment obtained with attorney-complicit fraud. Specifically, such cases *mandate* the complete vacation of such judgment, once such attorney-complicit fraud *alone* is shown, as here, *without any further showing whatsoever* by the moving party, although the defrauding party can *prevent* judgment vacation if it is able to prove the utter *immateriality* of its fraud.

"Thus, there is, in fact, very little difference between what *Hazel-Atlas* requires, and what the Constitution permits, in these circumstances: since Plaintiff *has already proven* the attorney-complicit fraud of Defendants, and Judge Wiseman, on more than sufficient evidence, found such fraud to have been material *to her*, and since Defendants were utterly unable to prove the *immateriality* of such fraud, no further showing by Plaintiff may be required under the Constitution. Accordingly, Judge Wiseman's ruling must be affirmed, consistent with the requirements of Due Process, without Defendants being afforded any further hearing in this case.

"Judge Wiseman's ruling, based on the Record already before this Court, must also be affirmed

because of the following, additional considerations: in the habeas corpus cases, the trial judge making the determinations concerning whether to vacate a conviction due to prosecutorial misconduct is rarely, if ever, the *original* trial judge, but rather, usually, a federal court reviewing state court proceedings.

"In the present case, Judge Wiseman *was herself present throughout* the original trial and, accordingly, *uniquely able* to ascertain the materiality of Defendants' fraud on the jury and herself, including the effect *the knowledge of the fraud itself*, which Mr. Henry *also* fraudulently concealed, *would* have had on her *own* rulings at trial, as well as the jury's determination. For example, in its Opinion, this Court itself acknowledges that Judge Wiseman may well have been within her prerogative to have simply entered a default judgment against Defendants pursuant to 12 O.S. 1996 §3237(E) *at trial* had she then known of Mr. Henry's fraudulent representations regarding specific questions – that is, Court-ordered *discovery* – posed to him by her herself. At a minimum, she would have been justified in entering orders of substantial issue or evidence preclusion against Defendants due to such serious misconduct. *Holm-Waddle v. Hawley*, 1998 OK 53 ¶10.

"Accordingly, since there is more than sufficient evidence in the record to have supported Judge Wiseman's determination, as the finder of fact and law, favorable to Plaintiff on all necessary matters, this Court should follow its own normal procedures, *Mock v. Stricklin*, 315 P.2d 247 (Okla. 1957), and affirm her decision even

> though she did not *specifically* address the question whether Defendants had failed to prove the *immateriality* of their and Mr. Henry's fraud."

(Pet. App. 58a-63a)

In refusing to grant Petitioner's Petition for Rehearing, the Oklahoma Supreme Court never addressed the federal constitutional issue. However, it is clear that in so raising the issue in her Petition for Rehearing, "that federal issue has been preserved for [this court's] review. See *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 85-87, n. 9, 100 S. Ct. 2035, 2043-2044, n. 9 (1980)". *Richards v. Jefferson Co., Ala.*, 517 U.S. 793, 797, n.3 (1996).

This is particularly so because the unprecedented refusal of the Oklahoma Supreme Court to follow *Hazel-Atlas* and affirm the Trial Court's Order vacating its earlier judgment could hardly have been less anticipated by Petitioner: The decision of the Oklahoma Supreme Court was directly contrary to its own prior decisions, *State Ex Rel. Commissioners of Land Office v. Jones*, 198 Okla. 1987, 176 P.2d 992 (1947), and *Abernathy v. Huston*, 166 Okla. 184, 26 P.2d 939 (1933) (both holding that complicity of party's attorney in false statements to the court requires the vacation of judgment for fraud without showing that such fraud was outcome-determinative, provided defrauded party presented prima facie case), *Hazel-Atlas Glass Co., supra*, and decisions of every other American Court which has ever addressed an issue of attorney-complicit fraud.[4] Indeed, the Oklahoma Supreme Court

---

[4] *Hazel-Atlas*, has been followed on all occasions when applicable, as here, in every American jurisdiction, prior to the

failed even to mention any of these cases in its Opinion, no doubt because it knew they were utterly unreconcilable with its ruling therein.

Accordingly, raising such due process arguments in her Petition for Rehearing was sufficiently timely for this Court to consider such preserved, to review the misconduct of the Oklahoma Supreme Court itself. *Brinkerhoff-Farris Trust & Savings Co. v. Hill*, 281 U.S. 673 (1930) (judicial branch equally bound by constitutional limitations of legislative branch); *Richards v. Jefferson Co., Ala., supra*, (same).

REASONS FOR GRANTING THE WRIT

This Court should grant Certiorari in this case for two simple reasons: (1) the Oklahoma Supreme Court has decided a substantial federal question in a way clearly in conflict with applicable decisions of this Court, including

---

Oklahoma Supreme Court's Opinion, and has never even been seriously questioned, let alone reversed. Simply by way of example, consider each of the following cases which follow *Hazel-Atlas* religiously, or reach an identical result: *Pumphrey v. K.W. Thompson Tool Co.*, 62 F.3d 1128 (9th Cir. 1995); *Averbach v. Rival Manufacturing Co.*, 809 F.2d 1016 (3rd Cir. 1987); *Browning v. Navarro v. Holloway*, 826 F.2d 335 (5th Cir. 1987); *Dausuel v. Dausuel*, 195 F.2d 774 (D.C. Cir. 1952); *In re: Intermagnetics America, Inc., et al. v. China International Trust and Investment Corporation*, 926 F.2d 912 (9th Cir. 1991); *Kupferman v. Consolidated Research and Manufacturing Corporation*, 459 F.2d 1072 (2nd Cir. 1972); *Leber-Krebs, Inc. v. Capitol Records*, 779 F.2d 895 (2nd Cir. 1985); *Sutter v. Easterly*, 189 S.W.2d 284 (MO 1945); *Publicker v. Shallcross*, 106 F.2d 949 (3rd Cir. 1939); *Toscano v. Commissioner of Internal Revenue*, 441 F.2d 930 (9th Cir. 1971).

Hazel-Atlas Glass Co. v. Hartford-Empire Co., supra, *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80 (1988), *Richards v. Jefferson Co., Ala., supra*, and *Chapman v. California*, 386 U.S. 18 (1967), and (2) the effect of the Oklahoma Supreme Court's decision, if left to stand, in defiance of federal due process requirements, could hardly be more corrosive of the administration of justice in Oklahoma.

I. PETITIONER HAS BEEN DEPRIVED OF HER RIGHT TO PROCEDURAL DUE PROCESS OF LAW BY THE OKLAHOMA SUPREME COURT'S REFUSAL TO PERMIT THE TRIAL COURT TO VACATE ITS EARLIER JUDGMENT ADVERSE TO PETITIONER'S CLAIMS AGAINST RESPONDENTS NOTWITHSTANDING THE TRIAL COURT'S UNDISTURBED FINDING OF ATTORNEY-COMPLICIT FRAUD ENGAGED IN BY RESPONDENTS IN OBTAINING SUCH JUDGMENT AND RESPONDENTS' INABILITY TO PROVE THE IMMATERIALITY OF SUCH FRAUD.

The Oklahoma Supreme Court ruled in this case that Respondents' judicially-determined attorney-complicit fraud on the Court, on Petitioner and on the jury was an insufficient reason for Judge Wiseman to set aside the judgment adverse to Plaintiff's tort claims in Patel I. As shown above at pp. 18-24, *Chapman v. California, supra*, requires, as a matter of due process, vacation of the Patel I judgment based on Respondents' attorney-complicit fraud and Respondents' failure to prove the immateriality of such fraud. *Hazel-Atlas* provides that there is a virtually irrebuttable presumption of the materiality of such fraud simply because the attorneys went to the trouble to effect it. Accordingly, there is virtually no difference

between what *Chapman v. California* permits, and what *Hazel-Atlas* requires, in these circumstances: vacation of the Trial Court's Patel I Judgment. The arguments which Petitioner made to the Oklahoma Supreme Court quoted on pp. 14-24, above, are directly applicable in this context. Oklahoma simply has an insufficient interest in the finality of its judgments to trump requirements of due process in this clear case of attorney-complicit fraud on the Court.

Accordingly, there can be no question but that the remand instructions contained in ¶38 of the Oklahoma Supreme Court's Opinion (Pet. App. 32a) violate the due process clause of the federal Constitution and Judge Wiseman's ruling must be affirmed. Furthermore, this Court should take this opportunity to make explicit the view, implicit in *Hazel-Atlas*, that a civil court has the inherent power and duty to cleanse itself, as a matter of due process, of all judgments obtained from it by attorney-complicit fraud. The Oklahoma Supreme Court's deviation from *Hazel-Atlas's* mandate is literally beyond the pale of what can be tolerated in any American jurisdiction, as all other courts in America have implicitly recognized. By permitting vastly different consequences to judicially defrauding and defrauded parties depending on whether the fraud is discovered before or after a judgment becomes final – as the Oklahoma Supreme Court explicitly does – the Oklahoma Supreme Court produces precisely the constitutionally-repugnant result *Hazel-Atlas* precludes. For example, by permitting, as it does in this case, a party to enjoy the fruits of even attorney-complicit fraud if it successfully conceals such fraud until after a judgment becomes final, Oklahoma

Supreme Court effectively encourages both such fraud and its concealment by such defrauding attorneys.

This Court has repeatedly granted Certiorari to review – and reverse – lower court decisions that erode substantive rights by resort to unauthorized procedural shortcuts. *Peralta v. Heights Medical Center, Inc., supra; Richards v. Jefferson County, Alabama*, 517 U.S. 793, 795-97 (1996) (due process violated by extreme application of res judicata); *Ortiz v. Fibreboard Corp.*, 119 S. Ct. 2295 (1999); *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 118 S. Ct. 956 (1998) (improper application of venue statute); *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997). The Oklahoma Supreme Court's insistence on upholding the claimed virtue of finality of a fraud-induced judgment in derogation of a plaintiff's procedural due process rights to enforce her tort claims in untainted judicial proceedings against Respondents is an even more extreme example of due process-deficient issue preclusion than that involved in *Richards v. Jefferson Co., Ala., supra*. The Court should grant Certiorari and rule that *Hazel-Atlas* indeed represents an essential piller of due process in all civil cases.

II. THIS CASE IS OF CRITICAL IMPORTANCE TO THE ADMINISTRATION OF JUSTICE.

As described above, on even date herewith, Petitioner is also filing a Petition For Writ Of Certiorari in Patel III, which was also decided by the Oklahoma Supreme Court in the same Opinion review of which is sought herein.

The effect of the Oklahoma Supreme Court's decision in both of these cases could hardly be more corrosive to the administration of justice in Oklahoma.

Quite simply, if the Oklahoma Supreme Court's Opinion in this case is unchanged by this Court, such will guarantee proliferation of attorney-complicit fraud in Oklahoma litigation for each of the following reasons: (1) such Opinion completely ignores an attorney's duty to disclose any frauds of which he is aware and, accordingly, effectively eliminates any such duty; (2) it gratuitously discriminates between fraud discovered prior to when, as opposed to subsequent to, a judgment becomes final, effectively precluding trial judges or parties from imposing or obtaining sanctions or other remedies for after-judgment discovered fraud. This has the further, perverse effect of encouraging defrauding attorneys to withhold knowledge of fraud on the court because their clients will benefit if they are successful in concealing such fraud until a judgment becomes final. (3) Together with its ruling in Patel III, it permits defrauding parties and their attorneys to retain the fruits of their fraud and so promotes judicial fraud and a "catch-me-if-you-can" mentality.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

CLIFFORD N. RIBNER
Counsel of Record
320 South Boston, Suite 1130
Tulsa, OK 74103
(918) 582-9200
Counsel for Petitioner

December 1999

APPENDIX A

1999 OK 33
IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

URVASHI B. PATEL, Appellee, v. OMH MEDICAL CENTER, INC., an Oklahoma Corporation, Saint Francis Hospital, Inc., an Oklahoma corporation, and John B. Stevens, an individual, Appellants. URVASHI B. PATEL, Appellant, v. OMH MEDICAL CENTER, INC., an Oklahoma Corporation, SAINT FRANCIS HOSPITAL, INC., an Oklahoma corporation, LARRY D. HENRY, an individual, and ARRINGTON, KIHLE, GABERINO & DUNN, INC., Appellees.	)	FOR OFFICIAL PUBLICATION Causes Nos. 90,489, and 89,582

ON APPEAL FROM THE DISTRICT COURT, TULSA COUNTY, JANE P. WISEMAN, TRIAL JUDGE, CAUSE NO. 90,489; ON APPEAL FROM THE DISTRICT COURT, TULSA COUNTY, DAVID L. PETERSON, TRIAL JUDGE, CAUSE NO. 89,582

(Filed Apr. 27, 1999)

¶0 Two related appeals stand before us for review. Both arise out of an earlier case tried to a jury in the

District Court, Tulsa County, Jane P. Wiseman, trial judge. In that action ("Patel I"), Urvashi B. Patel sought damages against OMH Medical Center, Inc., St. Francis Hospital, Inc., and John B. Stevens, an individual, for breach of contract and various torts. The jury returned a verdict for the plaintiff on the contract claim against defendant OMH Medical Center, Inc. only and for all defendants on the tort claims. The judgment, entered on the jury's verdict, was affirmed on appeal and the mandate issued. Shortly thereafter, Urvashi B. Patel filed an action ("Patel II") in the same court in which the Patel I judgment was rendered, seeking vacation of that portion of the Patel I judgment that rejected her tort claims on the ground that it had been secured by defendants' fraud. The trial court agreed and ordered the Patel I judgment vacated. In today's first appeal, the defendants in Patel I and Patel II seek reversal of the vacation order. While the vacation proceeding was pending, Patel filed an action ("Patel III") in the District Court, Tulsa County, David L. Peterson, trial judge, against the two corporate defendants in Patel I and II, their lead attorney in those cases and his law firm, for damages from various acts of fraud and deceit that allegedly occurred during the Patel I trial. Today's second appeal, brought by Patel, is from an order dismissing that action for failure to state a claim. Both causes stand retained for this court's consideration and for their disposition by a single opinion.

THE TRIAL COURT'S POSTJUDGMENT ORDER IN CAUSE NO. 90,489 VACATING THE PATEL I JUDGMENT IS REVERSED AND THE CAUSE REMANDED FOR FURTHER PROCEEDINGS TO BE CONSISTENT WITH TODAY'S PRONOUNCEMENT; THE TRIAL COURT'S ORDER OF DISMISSAL IN CAUSE NO. 89,582 IS AFFIRMED.

Clifford N. Ribner, Tulsa, Oklahoma, for Urvashi B. Patel, Appellee in Cause No. 90,489 and Appellant in Cause No. 89,582.

Larry D. Henry, Vivian C. Hale, Patrick W. Cipolla, Gable Gotwals Mock Schwabe Kihle Gaberino, Tulsa, Oklahoma, for Appellants, OMH Medical Center, Inc., St. Francis Hospital, Inc., and John B. Stevens, in Cause No. 90,489 and for Appellees, OMH Medical Center, Inc. and St. Francis Hospital, Inc., in Cause No. 89,582.

James M. Sturdivant, Vivian C. Hale, and Patrick Cipolla, Gable Gotwals Mock Schwabe Kihle Gaberino, Tulsa, Oklahoma, for Appellees, Larry D. Henry and Arrington, Kihle, Gaberino & Dunn, in Cause No. 89,582.

OPALA, J.

¶1 The dispositive issues tendered in these appeals are (1) whether the trial judge abused her discretion in ordering the Patel I judgment vacated, and (2) whether the litigation-related misconduct alleged here may be redressed through a civil action in tort. We answer the first question in the affirmative and the second in the negative.

I

THE ANATOMY OF LITIGATION

¶2 Dr. Urvashi B. Patel ("Patel" or "plaintiff"), an anesthesiologist, entered into a contract in June 1992 with OMH Medical Center, Inc. ("OMH") to practice anesthesiology and serve as director of anesthesia at OMH's medical facility in Okmulgee, Oklahoma. The contract provided that, after Patel relocated to the Okmulgee area, either party could terminate the contract for any reason or for no reason at all by giving the other party one hundred and twenty days advance written notice and by paying to the other party a termination fee of $50,000. Patel moved to the Okmulgee area and worked at OMH for a little more than one year.

¶3 In October 1993, OMH invoked the termination provision of the contract with Patel, but tendered only a portion of the contractual termination fee, claiming an off-set for its payment of Patel's malpractice insurance. Conversations took place between Patel and one or more agents of OMH concerning the amount of money owed to her under the contract and the quality of the professional recommendations OMH would provide to Patel as she sought new employment. In Patel I, these conversations were characterized by OMH as contract renegotiations, but portrayed by Patel as attempts to coerce her to abandon her contractual termination fee.

¶4 Whatever their purpose, the conversations came to nought, and Patel sued OMH, Saint Francis Hospital,

Inc., and John B. Stevens (collectively, "defendants")[1] for breach-of-contract damages, intentional infliction of emotional distress, and "prima facie tort" in connection with the termination of her contract.[2] The trial resulted in a jury verdict against defendant OMH alone on Patel's contract claim and for all defendants on the tort claims. Both Patel and OMH appealed. The Court of Civil Appeals, Division III, in an unpublished opinion filed 14

---

[1] OMH – Okmulgee Medical Center – is the facility at which Dr. Patel worked. St. Francis Hospital, Inc. assisted OMH with administration and provided managerial personnel. John B. Stevens was the administrator at OMH at the time the cause of action in Patel I arose. He answered both to the OMH board of directors and to the management of St. Francis.

[2] Patel alleged in her contract claim that OMH had not properly triggered the termination provision of the contract and, therefore, continued to owe her a monthly salary of $17,500. Defendants argued that the contract had been properly terminated, that they had paid Patel all but $12,464.18 of the termination fee, and that their dispute was properly limited to the latter amount. The trial court agreed with defendants and by summary adjudication, limited Patel's contract claim to $12,464.18. Patel's tort claims – intentional infliction of emotional distress and "prima facie tort" – were based upon her allegation that the defendants attempted to coerce her into abandoning the termination fee to which she was contractually entitled by threatening to provide her with poor or neutral recommendations if she persisted in trying to obtain the fee. Patel alleged that even neutral recommendations would be ruinous to her medical career. The expression "prima facie tort" does not appear ever to have been recognized in Oklahoma. For the view that the concept of prima facie tort has been applied in Oklahoma jurisprudence under limited circumstances, *see* Merrick v. Northern Natural Gas Co., 911 F.2d 426 (10th Cir. 1990).

May 1996, affirmed.[3] Patel's petition for certiorari was denied.

¶5 Shortly after accepting payment in satisfaction of the judgment and after the mandate in Patel I issued, plaintiff filed the first proceeding under review today ("Patel II"), seeking to vacate, pursuant to the provisions of 12 O.S. 1991 § 1031(4), that portion of the Patel I judgment which rejected defendants' liability on her tort claims. Patel alleges that the judgment was obtained through fraud committed on Patel and on the trial court in connection with the judge's decision in the Patel I trial to admit into evidence a certain defense exhibit ("Exhibit 1").

¶6 Exhibit 1 was a negative evaluation of Patel's professional performance provided to OMH by Scotland Memorial Hospital ("SMH"), the medical facility at which Patel worked prior to joining the staff of OMH. It was prepared by Mark W. Matson, M.D., Chair, Department of Surgery, a colleague of Patel at SMH[4] At the Patel I trial, OMH sought to introduce Exhibit 1, not for the truth of its contents, but for the purpose of rebutting an expert witness who testified on Patel's behalf that Patel would have suffered severe harm to her medical career had

---

[3] Urvashi B. Patel v. OMH Medical Center, Inc., St. Francis Hospital, Inc., and John B. Stevens, an individual, Supreme Court Cause No. 85,661, an unpublished opinion of the Court of Civil Appeals, Division III, May 14, 1996.

[4] Dr. Matson rated Patel's skills as average or below average, stating that her privileges had at one time been revoked, and recommending that she be monitored before being granted full privileges.

OMH carried out its alleged threats to deny her good references. In the expert's opinion, a doctor who had a negative reference in her file could not be hired. Exhibit 1 was offered to show that OMH had hired Patel despite the negative reference in her file from Dr. Matson, thereby rebutting Patel's expert witness.[5]

¶7 Patel objected to the admission into evidence of Exhibit 1. At a bench conference held to discuss the objection,[6] Patel's attorney stated that an OMH source had told his client that her OMH credentialing file contained a document from, or prepared from statements made by, another doctor who had worked with Patel at SMH. According to Patel, this document explicitly refuted the negative evaluation provided by Dr. Matson, characterizing Dr. Matson's attitude toward Patel as one of personal animosity.[7] Neither Patel nor her attorney had actually seen this document. Patel's attorney further informed the judge that he had only been told a few days before trial that Dr. Matson's negative evaluation would

---

[5] Dr. Matson's response was dated July 2, 1992. The contract between OMH and Patel was executed on June 16, 1992, two to three weeks *before* OMH received Exhibit 1 from Scotland Memorial Hospital. Patel makes the point that it could not therefore have played any part in OMH's original decision whether to hire her. It was received before her application for hospital privileges was considered by a peer review committee and was included in the materials the committee reviewed.

[6] The bench conference is transcribed in the trial record at pages 610-617.

[7] The refuting document turned out to be a memo drafted by an OMH employee, who prepared it to memorialize her telephone conversation with the doctor from Scotland Memorial Hospital who provided the refuting information.

be offered into evidence and that he had responded to that information by insisting that the entire file in which it was kept be produced.

¶8 The transcript of the bench conference shows that the court was clearly reluctant to admit Exhibit 1 into evidence. The OMH witness offering it had not been responsible for the file at the time it was created, and defendants had not brought to the trial the original file in its entirety. The court asked defendants' attorney several times in various ways whether there was anything in the file of the nature described by Patel's attorney. The answer was repeatedly that there was not and that Exhibit 1 was a complete document in itself. At one point, the court tried to pin down an answer by stating,

> " . . . The point is not that this document is incomplete but that there may be something in the file that references this document that explains it or further modifies it in some respect. . . . He is entitled to have that produced . . . "

Defendants' attorney responded,

> "There is nothing in the file of that nature. There are contradictory references from that city."

¶9 The judge then stated that she thought she needed to look at the file, but after being informed that the file was in Okmulgee, she decided to admit Exhibit 1 into evidence and permit Patel to offer testimony in rebuttal. Patel's attorney responded to the court's decision by saying,

> "Okay. That is fine."

¶10 Exhibit 1 was admitted into evidence. Patel's rebuttal testimony contraposed her unsubstantiated belief about the contents of her credentialing file to defendants' documentary evidence. Patel argues that the admission of Exhibit 1 without the refuting document left the jury with the false impression that a negative reference would not be an impediment to a doctor's future employment. Exhibit 1, she asserts, would have had little or no probative value at all on that issue if the existence of the refuting document had been known.

¶11 In her petition to vacate, Patel alleged that defendants' representations to the court regarding the contents of Patel's OMH file were false, that they were relied upon by the court in admitting Exhibit 1, and that the admission of Exhibit 1 tainted the verdict both because its negative contents prejudiced the jury against Patel and because it falsely rebutted a central contention in Patel's case, i.e. that a negative reference would severely harm her medical career.

¶12 In response to the petition to vacate, defendants filed a motion to dismiss, which was denied. Patel filed a motion for summary judgment. Oral arguments on the motion for summary judgment were heard on 27 March 1997. At the conclusion of the hearing, the trial court stated that she was not prepared to rule on the motion at that time, but would review the parties' submissions and make a decision at a later date.

¶13 On 14 November 1997 the trial court issued a ruling entitled "Order on Plaintiff's Petition to Vacate in Part." Neither in the title nor in the body of the instrument did the court specifically state whether the order

was responsive to Patel's motion for summary judgment, but it did state that the court had "reviewed and considered the parties' submissions on Plaintiff's Petition to Vacate Judgment in Part, including their briefs, affidavits, exhibits, oral arguments, and case authority." The court quoted extensively from the record of the bench conference and then concluded,

> "Mr. Henry made a specific representation to the Court that there was nothing in the file of the nature about which the Court was clearly concerned. This representation was, in fact, false, there being in the file a typed memorandum by Karen Legg, OMH's risk manager, who kept the credentialing files, regarding a call from Dr. Parkes at Scotland Memorial, a memorandum on this very point and falling squarely within the category sought by the Court. Dr. Parkes called specifically to refute Dr. Matson's negative reference and to explain the circumstances under which Dr. Matson criticized the Plaintiff's professional conduct, a negative evaluation which Dr. Parkes stated was 'strictly of a personal nature' and constituted a 'lack of professionalism on Dr. Matson's part.' . . . Mr. Henry [defendants' attorney] made the representation knowing that the Court was relying on it as a true representation of the state of the file which was known to Mr Henry but not to Mr. Ribner [Patel's attorney] or the Court.
>
> If Mr. Henry had responded that there was something in the file of that nature, the Court would have required it to be produced or would have excluded Defendant's Exhibit 1 on the basis that its admission, absent the additional file material, would mislead the jury on the

> exact point on which Mr. Henry offered it, that the presence of a negative reference in the file was no impediment to a doctor's future employment.
>
> Mr. Henry's misrepresentation to the Court and opposing counsel constitutes grounds under 12 O.S. Section 1031(4) to vacate the judgment on Plaintiff's tort claims entered on the jury verdict."

¶14 The petition to vacate having been granted, defendants filed their petition in error, which is *the first appeal under review today.* This court ordered the appeal retained.

¶15 In February 1997 while the petition to vacate was pending, Patel filed a third action ("Patel III")[8] against the corporate defendants in Patel I and Patel II, defendants' lead attorney in those cases, Mr. Larry D. Henry, and his law firm, Arrington, Kihle, Gaberino & Dunn, Inc. In Patel III, Patel seeks compensatory and punitive damages in tort for acts of fraud, deceit, and spoliation of evidence allegedly occurring during the Patel I trial.

¶16 Defendants moved to dismiss the Patel III petition on the grounds that it failed to state a claim upon which relief can be granted. The trial court agreed, ruling that no basis exists under current Oklahoma case authority for Patel's claims. Patel's appeal from the dismissal order is *the second case which we review today.* It, too, was retained for this court's disposition.

---

[8] Patel III was assigned to Judge David L. Peterson, rather than to Judge Jane P. Wiseman, who presided over Patel I and Patel II.

II

STANDARD OF REVIEW

A.

A CORRECT CHARACTERIZATION OF THE TRIAL COURT PROCEEDINGS MUST PRECEDE THE COURT'S SELECTION OF THE STANDARD OF REVIEW.

¶17 This case presents a procedural imbroglio that makes the assignment of the appropriate standard of review somewhat difficult. Two motions were presented to the trial court. One was defendants' motion to dismiss. The other was Patel's motion for summary judgment. A motion to dismiss may be interposed against a petition to vacate.[9] The purpose of a dismissal motion is to test the law's support for a claim, not the sufficiency of the underlying facts.[10] Where a motion to dismiss tenders facts to be considered by offering materials *dehors* the pleadings, it is incumbent upon the trial court to treat the motion as one for summary judgment.[11] Defendants'

---

[9] Lewis v. Couch, 194 Okla. 632, 154 P.2d 51, 52 (1944); Stout v. Derr, 171 Okla. 132, 42 P.2d 136, 138 (1935). These cases, decided before the adoption of the Oklahoma Pleading Code, 12 O.S. 1991 §§ 2001 et seq., approved the interposition of a demurrer to a petition to vacate. A demurrer to a petition under 12 O.S. 1981 § 267 contained many of the same grounds for challenging the sufficiency of pleadings as are now provided for by the motion to dismiss in 12 O.S. 1991 § 2012(B). By analogy, a motion to dismiss may now be interposed against a petition to vacate to the same extent as a demurrer might have been under the earlier regime.

[10] Zaharias v. Gammill, 1992 OK 149, ¶6, 844 P.2d 137, 138.

[11] Dyke v. Saint Francis Hospital, Inc., 1993 OK 114, ¶7, 861 P.2d 295, 298-299; Norman v. Trison, 1992 OK 67, ¶4, 832 P.2d 6, 8. *See also* Silver v. Slusher, 1988 OK 53, n. 8, 770 P.2d 878, 881, n.

motion to dismiss tendered for consideration in this case an excerpted portion of the transcript of testimony in the Patel I trial. This material's inclusion required the trial court to treat defendants' dismissal motion as a motion for summary judgment. *In short, the end result of this procedural exchange confronted the trial court with cross motions for summary judgment.*

¶18 Summary process is governed by District Court Rule 13.[12] It sets forth in detail the procedures to be followed where there are no fact issues in dispute and *judgment may be appropriate as a matter of law. By its very terms, Rule 13 applies to prejudgment issues only.*[13] *A vacation proceeding under 12 O.S. 1991 § 1031 is a legislatively created remedial mechanism in which a litigant seeks not a judgment, but rather relief from a judgment.*[14] *There are no*

8, *U.S. cert. denied sub nom.* Silver v. Farmers & Merchants Ins. Co., 493 U.S. 817, 110 S.Ct. 70, 107 L.Ed.2d 37 (1989). The pertinent portion of 12 O.S. 1991 § 2012(B) states:

> " . . . If, on a motion asserting the defense numbered 6 of this subsection to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by the rules for summary judgment. . . . "

[12] 12 O.S. 1991 Ch. 2, App., Rule 13.

[13] *Cf.* Pickens v. Tulsa Metropolitan Ministry, 1997 OK 152, ¶7, 951 P.2d 1079, 1082.

[14] Parker v. Board of County Commissioners of Okmulgee County, 187 Okla. 308, 102 P.2d 880 (1940). *See also,* Assmann v. Fleming, 159 F.2d 332, 336 (8th Cir. 1947). The statute setting

prejudgment issues in a vacation proceeding. On the contrary, a vacation quest is *a postjudgment remedy*. It represents neither a common law or statutory claim nor does it result in a judgment which settles the rights between the parties. Because a vacation proceeding is *a statute-governed procedure to determine postjudgment issues*, summary adjudication process cannot be utilized to decide the matters in contest.[15] This is not to say that an adversary

---

forth the courts' power to vacate or modify their own judgments is found at 12 O.S. 1991 § 1031. The first two grounds relate to the courts' power under other statutes to grant a new trial and are governed by the provisions of those other statutes. The third ground for modification or vacation of a judgment or order is that of mistake, neglect or omission of the clerk or irregularity in obtaining a judgment or order. Relief on this ground may be requested in the form of a motion. 12 O.S. 1991 § 1032. Proceedings to vacate or modify a judgment or order on the fourth through ninth grounds of § 1031 must be initiated by a petition and verified by affidavit setting out certain specified information. 12 O.S. 1991 § 1033. Personal jurisdiction must be obtained by the issuance and service of a summons "as in the commencement of an action." Id. Petitions to vacate on the grounds numbered four through nine must be initiated within two years of the date of the judgment or order sought to be vacated or, in the case of fraud, within two years of the discovery of the fraud. 12 O.S. 1991 § 1038.

[15] The use of summary process in a postjudgment remedial procedure such as that under review today would not even be contemplated were it not for some earlier decisions by this court suggesting that a vacation quest is a civil action. Lewis v. Couch, 194 Okla. 632, 154 P.2d 51 (1944); Turner v. First Nat'l Bank & Trust Co. of Oklahoma City, 186 Okla. 403, 97 P.2d 894 (1940); Stout v. Derr, 171 Okla. 132, 42 P.2d 136 (1935); Burton v. Swanson, 142 Okla. 134, 285 P. 839 (1930); Dardenne v. Daniels, 101 Okla. 201, 225 P. 152 (1924). These cases are generally concerned with the procedural tools initially available to a

hearing must be afforded in every vacation quest. Although the Rule 13 procedural regime *is textually confined to prejudgment issues*, there is no legal impediment to the use – *in a § 1031 postjudgment vacation proceeding* – of acceptable evidentiary substitutes[16] to eliminate from adversary contest *any individually and clearly defined fact issue* that is claimed as undisputed and shown to be supported *solely by inferences* consistent with the movant's position in the case.[17]

¶19 Removing then, as we do, Rule 13 from the procedural arsenal available in a vacation proceeding, we must treat both Patel's motion for summary judgment and defendants' motion to dismiss/motion for summary

---

defendant in response to the service of a petition to vacate. They relate to the form of the initial pleadings and not to the substantive nature of the proceeding as a whole. Their use of the term "civil action" in reference to a vacation proceeding does not support the sweeping conclusion that a vacation proceeding is a civil action in all respects and for all purposes. To the extent that these cases, all of them antedating the birth of summary process, express that view, they are disapproved.

[16] " 'Acceptable probative substitutes' are those which may be used as 'evidentiary materials' in the summary process of adjudication." Shamblin v. Beasley, 1998 OK 88, 967 P.2d 1200, 1208, n.22 (quoting from Jackson v. Oklahoma Memorial Hosp., 1995 OK 112, 909 P.2d 765, 773 n. 35 and Gray v. Holman, 1995 OK 118, 909 P.2d 776, 781 n. 16). *See also*, Seitsinger v. Dockum Pontiac Inc., 1995 OK 29, 894 P.2d 1077, 1080-81; Davis v. Leitner, 1989 OK 146, 782 P.2d 924, 926-27.

[17] Probative material to be used for support of one's position that a certain "individually and clearly defined issue" is to be taken as undenied could be tendered by a party's motion to eliminate the identified issue (or issues) from consideration in an adversary hearing.

judgment as mere cross motions to enter matter for hearing. The trial court's order granting Patel's petition to vacate must hence be viewed as *responding directly* to Patel's quest for vacation.[18] The appropriate standard of review is to be assigned on that basis.

B.

STANDARD FOR REVIEW OF AN ORDER GRANTING OR DENYING A PETITION TO VACATE ON THE GROUNDS OF FRAUD

¶20 The standard for review of a nisi prius order granting or denying a petition to vacate is whether the trial court abused its discretion.[19] An abused judicial

---

[18] The record reflects that oral arguments on the motion for summary judgment were heard on 27 March 1997. At the conclusion of the hearing, the trial court stated that she was not prepared to rule on the motion at that time, but would review the parties' submissions and make a decision at a later date. On 14 November 1997, the trial court issued a ruling entitled "Order on Plaintiff's Petition to Vacate in Part." Neither in the title nor in the body of the instrument does the court specifically state that she is ruling on Patel's motion for summary judgment, but she does state that she has "reviewed and considered the parties' submissions on Plaintiff's Petition to Vacate Judgment in Part, including their briefs, affidavits, exhibits, oral arguments, and case authority." The Order then grants Patel's petition to vacate. It is unclear whether the court intended her order to be responsive to the motion for summary judgment or whether it was issued directly in response to the petition to vacate.

[19] Farm Credit Bank of Wichita v. Trent, 1997 OK 70, ¶21, 943 P.2d 588, 591; Hassell v. Texaco, Inc., 1962 OK 136, ¶14, 372 P.2d 233, 235; Lambert v. Lambert, 206 Okla. 577, 245 P.2d 436, 439 (1952); Parker v. Board of County Comm'rs of Okmulgee County, 187 Okla. 308, 102 P.2d 880, 882 (1940).

discretion is manifested when discretion is exercised to an end or purpose not justified by, and clearly against, reason and evidence.[20] It is discretion employed on untenable grounds or for untenable reasons, or a discretionary act which is manifestly unreasonable.[21] We turn next to consider whether the trial court abused her discretion in granting the petition to vacate in this case.

III

THE TRIAL COURT ABUSED ITS DISCRETION IN GRANTING THE ORDER VACATING THE PATEL I JUDGMENT

¶21 Defendants urge four grounds for reversal of the trial court's order vacating the Patel I judgment: (1) the vacation proceeding is barred by settled-law-of-the-case doctrine, (2) Patel's allegations of *intrinsic fraud* are not sufficient to vacate a judgment, (3) Patel has failed to show that defendants' misrepresentations, if any, were made with the scienter necessary for securing the vacation of a judgment, and (4) an evidentiary hearing is required prior to the vacation of a judgment for fraud and none was afforded to defendants. We hold that the nisi prius order vacating the Patel I judgment must be reversed and the cause remanded, though we do so for reasons other than those raised in defendants' first three arguments. We reverse the nisi prius order in this case

---

[20] In re Stackman, 1963 OK 264, ¶29, 388 P.2d 305, 311; State ex rel. Shull, 142 Okla. 293, 286 P. 891 (1930).

[21] *See, e.g.* State ex rel. Campbell v. Cook, 86 Wash. App. 761, 938 P.2d 345 (1997).

both because we agree with defendants' fourth ground for reversal – that an evidentiary hearing was indeed the defendants' due – as well as because of the need to explore below the prudential issues newly unveiled in Part III D.

A.

A PETITION TO VACATE IS NOT BARRED BY SETTLED-LAW-OF-THE-CASE DOCTRINE

¶22 Defendants first argue that Patel's petition to vacate is barred by settled-law-of-the-case doctrine.[22] In their view, all issues relating to Exhibit 1 and the contents of Patel's credentialing file were settled in the appeal of the Patel I case, barring Patel from thereafter raising in the context of a vacation proceeding any issue relating to Exhibit 1. Settled-law-of-the-case doctrine operates to bar relitigation of issues in a case that are finally settled by an appellate opinion or those the aggrieved party failed to raise on appeal.[23] Settled-law-of-the-case doctrine is a rule of judicial economy designed to prevent an appellate court from twice having to deal with the same issue. The issue in a vacation proceeding under 12 O.S. 1991 § 1031(4) is fraud. There is nothing in the course of antecedent decisional process in this case that has settled

---

[22] The correctness of the defendants' contention that the vacation quest was barred by the settled-law-of-the-case doctrine is the only argument that must undergo *de novo* review.

[23] Morrow Dev. Corp. v. American Bank & Trust Co., 1994 OK 26, n.2, 875 P.2d 411, 413, n.2; Mobbs v. City of Lehigh, 1982 OK 149, n.5, 655 P.2d 547, 549, n.5; Panama Processes v. Cities Service Co., 1990 OK 66, n.27, 796 P.2d 276, 283, n.27.

the issue of fraud. Accordingly, settled-law-of-the-case doctrine is not a bar to plaintiff's vacation quest.

B.

INTRINSIC FRAUD WILL SUPPORT THE VACATION OF A JUDGMENT WHERE RELIEF FROM THE JUDGMENT IS SOUGHT IN THE MANNER AND WITHIN THE TIME SPECIFIED BY STATUTE

¶23 Defendants next argue this court's extant jurisprudence requires that relief from a judgment under the provisions of § 1031(4) be predicated upon fraud which is "extrinsic" or which amounts to "fraud on the court." "Intrinsic fraud," they assert, will not support the vacation of a judgment where relief is sought under the provisions of § 1031. Defendants maintain that the trial court erred in granting Patel's vacation quest because her petition to vacate alleges acts of intrinsic fraud only. *We disagree.* Defendants are *incorrect* in their contention that *a § 1031 vacation quest must rest upon extrinsic fraud.* To the contrary, relief from a judgment in a statutory proceeding brought pursuant to § 1031 *may be predicated upon intrinsic as well as extrinsic fraud.* Only where vacation is sought in an independent action pressed *after* the lapse of the statutory period for bringing a § 1031 proceeding is the petitioner circumscribed by the extrinsic-fraud requirement.

¶24 The distinction between intrinsic and extrinsic fraud in proceedings to set aside a judgment for fraud is usually traced back to the case of *United States v.*

Throckmorton,[24] a nineteenth-century decision by the United States Supreme Court. In that case, an independent action in equity, the Court refused to set aside a judgment obtained more than twenty years earlier on allegedly perjured testimony and falsified evidence.[25] In *Throckmorton* the Court provided an extensive analysis of the then-extant English and American authorities on the subject of setting aside judgments for fraud and arrived at what has become the classic description of the two types of fraud.[26] When the Federal Rules of Civil Procedure were amended in 1946, the *Throckmorton* limitation was explicitly rejected in federal vacation proceedings initiated within the time limit provided by the rule for

---

[24] United States v. Throckmorton, 98 U.S. 61, 25 L.Ed. 93 (1878).

[25] Id. at 69.

[26] Throckmorton, at 65-66. ("Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side, – these, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new trial and a fair hearing. (citations omitted) . . . On the other hand, the doctrine is equally well settled that the court will not set aside a judgment because it was founded on a fraudulent instrument, or perjured evidence, or for any matter which was actually presented and considered in the judgment assailed. . . . ").

seeking relief by motion.[27] Its viability in vacation proceedings initiated under the federal rules by an independent action remains an area of controversy in federal civil procedure.[28]

---

[27] FRCP Rule 60(b)(3) provides:

"Rule 60. Relief From Judgment or Order

(b) . . . On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (3) fraud (whether heretofore denominated intrinsic or extrinsic), . . . "

[28] 7 J. Moore, J. Lucas, MOORE'S FEDERAL PRACTICE ¶60.24[1] at 60-206; *See, e.g.* Averbach v. Rival Manufacturing Co., 809 F.2d 1016 (3rd Cir. 1987), *cert. denied*, 482 U.S. 915, 107 S.Ct. 3187, 96 L.Ed.2d 675 (1987); *cert. denied*, Rival Manufacturing Co. v. Averbach, 484 U.S. 822, 108 S.Ct. 83, 98 L.Ed.2d 45 (1987) (" '[The distinction] is most unfortunate, if true. [It] rests on cloudy and confused authorities, its soundness as a matter of policy is very doubtful, and it is extremely difficult to apply. It ought not to persist as a limit on independent actions now that it has been abolished on motions.' 11 C. Wright & A. Miller, Federal Practice and Procedure § 2868, at 240-241 (1973) (footnotes omitted)"). Indeed, some have questioned whether *Throckmorton* actually remained authoritative even as it was being cited by state and federal courts for a century. The ambiguity lies in the dictum of Mr. Justice Harlan in the case of Marshall v. Holmes, 141 U.S. 589 (1891), decided thirteen years after *Throckmorton*. Like *Throckmorton, Marshall* involved forged documents and perjured testimony introduced at trial. In *Marshall,* Mr. Justice Harlan stated that equity will provide relief from any judgment obtained through fraud where conscience requires relief and the complaining party is not at fault. Id. at 596. This appears to directly contradict the holding in *Throckmorton,* yet *Throckmorton* was cited as the authority for the dictum. The Court has never resolved the apparent conflict.

¶25 This court has adopted the essence of the *Throckmorton* definitions of extrinsic and intrinsic fraud. We have defined *extrinsic fraud* as "(a) any fraudulent conduct of a successful party, (b) perpetrated *outside* of an actual adversary trial or process and (c) practiced directly and affirmatively on the defeated party, (d) whereby he was prevented from presenting *fully* and *fairly* his side of the case."[29] Examples of extrinsic fraud include false representations that the defeated party is merely a nominal party against whom no relief is sought, false promises of compromise, concealment of suit, kidnapping of witnesses, and similar conduct. [30] We have defined "*intrinsic fraud*" as:

> " . . . any fraudulent conduct of the successful party which was practiced during the course of an actual adversary trial of the issues joined and which had no effect directly and affirmatively to mislead the defeated party to his injury after he announced that he was ready to proceed with the trial. If during the trial the successful party urges forged instruments, or perjured testimony or fails to introduce witnesses of whom he has knowledge and whose testimony would help his adversary and impair his own case, he is guilty of fraud; but it is intrinsic fraud, for relief from which application must be made to the court

---

[29] FDIC v. Jernigan, 1995 OK 54, ¶15, 901 P.2d 793, 798; Chapman v. Chapman, 1984 OK 89, ¶9, 692 P.2d 1369, 1372-1373; Sadberry v. Hope, 1968 OK 107, ¶13, 444 P.2d 175, 177.

[30] Sadberry, *supra* note 29 at ¶13, at 177.

having jurisdiction of the issues joined and tried."[31]

¶26 While the definitions are fairly simple and straightforward, their application has often been somewhat hazy, leaving the erroneous impression that vacation proceedings brought under § 1031 are restricted to extrinsic fraud. Defendants cite a number of cases in support of their contention that intrinsic fraud will not support relief from a judgment under the provisions of § 1031(4). In *Chapman v. Chapman*,[32] a former wife sought, nearly fifteen years after a divorce had been granted, the vacation of the property settlement provisions of a divorce decree on the ground of fraud. The trial court sustained a demurrer to her petition and this court affirmed, holding that the husband's alleged concealment of spousal assets did not rise above intrinsic fraud. *Defendants mistakenly interpret this case as an application of the extrinsic fraud rule to a § 1031 proceeding. It was not.* While we did in fact apply the extrinsic fraud rule, we did so only because the petitioner had failed to file her petition within the time limit provided for a §1031 proceeding. *Chapman* was an independent suit in equity, not a §1031 proceeding, the time for which had expired two years after the divorce decree had been rendered. We noted in *Chapman, "An independent suit in equity . . . will not lie for relief from intrinsic fraud but only from extrinsic fraud. Relief*

---

[31] Miller v. Miller, 1998 OK 24, n.74, 956 P.2d 887, 905, n.74, and Chapman, *supra* note 29 at 1373, n.6, both quoting from Calkin v. Wolcott, 182 Okla. 278, 77 P.2d 96, 100 (1937); FDIC v. Jernigan, *supra* note 29 at ¶14, at 798.

[32] Chapman, *supra* note 29.

from the former must be by direct attack in the same case in which fraud was committed . . . " (emphasis added).[33]

¶27 Defendants also cite *In re Forfeiture of a 1974 Mercury Cougar,*[34] in which the court recited the extrinsic fraud rule in a case brought under the provisions of §1031, but then decided the case on a different basis. The Ponca City police had seized a 1974 Mercury Cougar owned by petitioners, charging that the car was being used unlawfully to transport marijuana. The car was subject to a purchase money security interest held by Bank. No notice of forfeiture was given to Bank as required by statute and Bank was not represented at the forfeiture hearing. A forfeiture order was issued, following which Bank released its lien. Petitioners sought to vacate the forfeiture order under the provisions of §1031 (4) on the grounds of constructive fraud for failure of the State to provide the requisite statutory notice to Bank. The trial court sustained the State's demurrer. On appeal, this court recited the extrinsic fraud rule, but it is readily apparent that it was not the basis of the court's decision. The opinion states that the existence of the lien was simply irrelevant; it would not have been a defense to the forfeiture action. *The opinion clearly rests on the court's view that no fraud was involved.*[35] Any reference in that case to the extrinsic fraud rule was purely gratuitous.

---

[33] Id. at 1373, n.6.

[34] 1978 OK 102, 581 P.2d 465.

[35] Id. at ¶12, at 467.

¶28 Other cases cited by defendants are also distinguishable. *Byrd v. Marlin*,[36] an action to set aside a judgment and cancel certain conveyances, was not brought in the same case and same court in which the judgment sought to be vacated was rendered. It was an independent proceeding brought on grounds authorized by §1031(4), but not technically a §1031 proceeding. The court discussed the extrinsic fraud rule, but appears to have decided the case on the basis of unconscionable conduct on the part of a trustee toward the cestui que trust.

¶29 In *Pippin v. Jones*,[37] a divorce decree had determined Mr. Pippin to be the father of a child of the marriage. Sometime later, Mr Pippin brought a §1031 proceeding, claiming fraud in the finding of paternity in the divorce action. This proceeding resulted in an agreed order that he was not the child's father. Still later, the ex-wife brought a paternity action against another man. The trial court in that paternity action found that the agreed order establishing Mr. Pippin's non-paternity was void for failure to comply with §1031. On appeal, the appellate court, after reciting the extrinsic fraud rule, affirmed the trial court's order, holding that Mr. Pippin had never alleged in his §1031 proceeding that any fraud had been practiced on him regarding his paternity and had therefore never properly invoked §1031.[38] Hence, the *Pippin* decision had nothing to do with the distinction between intrinsic and extrinsic fraud.

---

[36] 208 Okla. 655, 258 P.2d 649 (1953).

[37] 1993 OK CIV APP 113, 856 P.2d 609.

[38] Id. at ¶16, at 611.

¶30 Two other appellate decisions cited by defendants appear at first blush to support their contention that only extrinsic fraud will support the vacation of a judgment, but each of these contains a qualification that in essence consumes the rule it purports to invoke. In *Copeland v. Anderson*,[39] an ex-wife brought a proceeding to modify a property settlement in a divorce action on the ground of fraud. Holding that the ex-husband's motion to dismiss was correctly granted, the Court of Civil Appeals stated that a §1031 proceeding

> "is restricted to a narrow range of malfeasance extrinsic and collateral to the issues tried. . . . Allegations that a judgment was obtained on evidence known by plaintiff to be false are not sufficient to permit disturbance of the judgment when such party was not prevented from fully and fairly presenting his side of the case."[40]

The appellate court then discussed at some length the fact that the petitioner in *Copeland* had reason to be suspicious of her husband's actions even before the divorce action was filed and that she apparently could have, and should have, "garnered the evidence in advance of trial and presented it in court."[41] The court's focus on the petitioner's suspicions prior to the original trial, when viewed in light of the court's statement quoted above that false evidence will not support disturbance of a judgment *when such party was not prevented from fully and fairly*

---

[39] 1985 OK CIV APP 30, 707 P.2d 560, *overruled on other grounds*, Cooper v. Parker-Hughey, 1995 OK 35, 894 P.2d 1096.

[40] Id. at ¶39, at 570.

[41] Id. at ¶42, at 570.

presenting his side of the case, suggests that the real question for the court was not whether the fraud was extrinsic or intrinsic, but whether the judgment had been secured under circumstances requiring relief.

¶31 A similar case is *Sadberry v. Hope.*[42] Again the court appears to be relying on the rigid extrinsic-intrinsic rule, but as in *Copeland* posits the means of escape from the constraint on its discretion that the inflexible application of that rule imposes. In *Sadberry,* the plaintiff sought a writ of prohibition to restrain the trial judge from conducting a hearing on a guardian's petition to vacate a judgment imposing a surcharge on her. In holding that the writ of prohibition should be granted, the court recited the general rule that fraud sufficient to support the vacation of a judgment must be extrinsic and collateral to the issues tried and must prevent the complaining party from fairly exhibiting his case in court.[43] The court went on to explain that the matters about which the guardian claimed fraud were all known to her at the time of trial and were presented at the trial or could have been presented had the guardian chosen to present them. Further, the court noted that the guardian had failed to show how the plaintiffs or their counsel had prevented her from presenting fully and fairly her side of the case. Both *Copeland* and *Sadberry,* which appear to reject intrinsic fraud as a ground for vacating a judgment, *actually turn less on that distinction and more on the question of whether*

---

[42] 1968 OK 107, 444 P.2d 175.

[43] Id. at ¶12, at 177.

the complaining party had a fair adversary proceeding, regardless of the category into which the allegations of fraud happened to fall.

¶32 The provisions of §1031(4) make no distinction between intrinsic and extrinsic fraud. To the extent that *Copeland, Sadberry,* or any other decisions of this court have applied the intrinsic/extrinsic dichotomy to vacation proceedings under §1031(4) brought in the same court in which the judgment sought to be vacated was rendered, their expressions are disapproved and withdrawn. *More recent decisions have made clear* that the intrinsic/extrinsic polarity is not applicable to vacation proceedings brought pursuant to §1031.[44] *Patel's petition is not insufficient* because the acts alleged to be fraudulent may be categorized as intrinsic fraud.[45]

---

[44] FDIC v. Jernigan, 1995 OK 54, 901 P.2d 793 (holding that because the allegation of fraud was of an intrinsic nature, the vacation quest was time-barred in that it had been brought after the lapse of two years from the date of the order sought to be vacated); Chapman v. Chapman, 1984 OK 89, 692 P.2d 1369 (holding that a vacation claim instituted more than two years after judgment – by an independent suit in equity rather than in the original case – must be predicated upon extrinsic fraud practiced in obtaining the judgment).

[45] Patel argues that defendants' fraud also constitutes "fraud on the court." We need not decide whether the fraud alleged is or is not fraud on the court because we have held that her petition is sufficient based upon intrinsic fraud. It is likewise unnecessary to determine whether an attorney's misrepresentations to the court in a bench conference, which are not in themselves testimony in the case in chief, are intrinsic or extrinsic to the proceeding. We merely hold that *if* the allegations in Patel's petition state intrinsic fraud, they are sufficient to support the relief requested.

C.

PROOF OF ACTUAL FRAUD IS NOT NECESSARY TO OBTAIN §1031 RELIEF FROM A JUDGMENT

¶33 Defendants next contend that in order for a vacation quest to succeed, all of the elements of actual fraud must be established, including an intent to deceive. They argue that Patel has failed to prove that defendants' misrepresentations, if any, were made with the requisite scienter. Moreover, the order granting Patel's petition to vacate failed to make any finding that defendants intended to deceive either the trial court or Patel. We reject the contention that proof of actual fraud is required in order to obtain relief from a judgment under §1031.

¶34 Fraud, a generic term with multiple meanings[46] is divided into actual fraud and constructive fraud.[47] Actual fraud is the intentional misrepresentation or concealment of a material fact which substantially affects another person.[48] Constructive fraud, a breach of either a legal or equitable duty, does not necessarily involve any moral guilt, intent to deceive, or actual dishonesty of purpose.[49] It may be defined as any breach of a duty

---

[46] Faulkenberry v. Kansas City Southern Railway Co., 1979 OK 142 ¶4, 602 P.2d 203, 206, *U.S. cert. denied*, 464 U.S. 850, 104 S.Ct. 159, 78 L.Ed.2d 146 (1983); Singleton v. LePak, 1967 OK 37, ¶13, 425 P.2d 974, 978.

[47] Faulkenberry, *supra* note 46 at n. 6, at 206, n. 6; Steele v. Steele, 295 F.Supp. 1266, 1269 (D.C.W.Va. 1969).

[48] Faulkenberry, *supra* note 46 at ¶4, at 206.

[49] Id. at ¶4, at 206. Constructive fraud does not require an intent to deceive, and liability for constructive fraud may be based on negligent or even innocent misrepresentation. U.S. Fibres, Inc. v. Proctor & Schwartz, Inc., 358 F.Supp. 449, *aff'd*, 509

which, regardless of the actor's intent, gains an advantage for the actor by misleading another to his prejudice.[50] Constructive fraud, which has the very same legal consequence as actual fraud, may be invoked to prevent harm or to extend protection to recognized public interests.[51]

¶35 In some older decisions of this court, it was held that only actual fraud would support the vacation of a judgment.[52] *In light of our view, just stated, that constructive fraud has the very same legal consequences as actual fraud, such a restriction can no longer be considered a correct exposition of our statutory law.* Hence, constructive fraud will support the vacation of a judgment in a §1031 proceeding, and the trial court's order here under review is not infirm by its failure to make a finding of fact as to the element of intent required for proof of actual fraud.

F.2d 1043, 1047 (6th Cir. 1975). Phillips v. Ball, 1960 OK 145, ¶13, 358 P.2d 193, 197 (where one has a duty to speak, but remains silent, he may be guilty of constructive fraud).

[50] *See* France v. Chaprell Jeep-Eagle Dodge, Inc., 1998 OK CIV APP 159, ___ P.2d ___.

[51] Faulkenberry, *supra* note 46 at ¶4, at 206.

[52] Fed. Tax Co. v. Board of County Comm'rs of Okmulgee County, 187 Okla. 223, 102 P.2d 148 (1940); Abernathy v. Huston, 166 Okla. 184, 26 P.2d 939 (1933) (ordinarily the fraud essential to vacate a judgment on direct attack must be actual fraud, but the use of constructive fraud is permitted); Brown v. Trent, 36 Okla. 239, 128 P. 895 (1912).

D.

IT IS AN ABUSE OF DISCRETION TO GRANT A VACATION QUEST ON THE GROUNDS OF FRAUD WITHOUT FIRST EVALUATING THE PETITION IN LIGHT OF EQUITABLE LIMITATIONS ON OBTAINING THE RELIEF REQUESTED

¶36 Patel seeks relief from a judgment on the basis of acts of fraud allegedly occurring during the course of a trial at which she was present and participated. Her petition to vacate and other pleadings in the vacation quest show that at the time of the Patel I trial, Patel had what she believed to be reliable information that defendants' representations to the court about her credentialing file were false and misleading. Patel objected to the admission of Exhibit 1 and informed the court of her belief that the file contained another document which would contradict the document being offered into evidence by defendants. Although Patel never withdrew the objection, she did not ask for a delay or continuance in the trial to review the file for the document she believed it contained, nor did she stand on her objection when the court arrived at its compromise permitting Patel to testify about Exhibit 1. In fact, the record reflects that the court would have been justified in interpreting her response as acquiescence in the granted compromise.

¶37 A vacation quest must be evaluated in light of the principle of the finality of judgments.[53] That principle, conceptually encompassed in the various preclusion

---

[53] Robinson v. Audi Aktiengesellschaft, 56 F.3d 1259, 1265 (10th Cir. 1995), *cert. denied*, 516 U.S. 1045, 116 S.Ct. 705, 133 L.Ed.2d 661 (1996).

doctrines, collides in a vacation proceeding with the principle that a fair adversary proceeding must be vouchsafed to the parties in a lawsuit. An unlimited ability to attack a judgment valid on its face would burden the judicial system with the potential for endless and repetitious litigation and jeopardize the public's and the parties' reliance on seemingly final adjudications. On the other hand, where a party has not had a reasonable opportunity to litigate a claim or defense before a court having jurisdiction, unwavering adherence to the doctrine of finality of judgments would result in unfairness and in the lowering of the judicial system in the esteem of the affected litigants as well as of the public. Neither a blanket prohibition against relief from judgments nor the mandated consideration of each and every petition to vacate is desirable or necessary. Both principles must be upheld and are best protected by placing reasonable and prudent procedural requirements on a litigant who launches a §1031 attack.

¶38 We accordingly hold that in a proceeding under §1031 to vacate an earlier judgment on the grounds of fraud, *the petitioner must:* (1) show that he (or she) acted without delay in asserting his (or her) rights after discovering the fraud, (2) establish that he (or she) used diligence in the original action in trying to discover and expose the fraud, (3) provide clear and convincing evidence of the fraud, and (4) demonstrate that there is a substantial likelihood that a new trial will have a different result. The prudential requirements we impose today on one who initiates a §1031 attack will ensure that the complaining party has not in some way helped to create, or invited, the need for a new trial and that granting a

new trial will not be a useless exercise. The absence from the record of any judicial inquiry into these prudential factors requires that the postjudgment order of vacation be reversed and the cause remanded for further proceedings.

¶39 One of the dissenters would reverse the trial court's order and direct that vacation relief be denied. It is unclear whether that dissenter considers the petition (for vacation) facially insufficient or whether he deems the defendant entitled to victory by summary relief. If it be the latter, today's withdrawal of the Rule 13 regime from the procedural arsenal the parties may invoke in a vacation proceeding *makes summary disposition unavailable* in this case.[54] If, on the other hand, the dissenter's view is that the petition's facial insufficiency requires its dismissal, he is in error. The allegations of the petition are sufficient to state a prima facie case of fraud. Until this pronouncement, no more was necessary to avoid a vacation petition's dismissal.[55] Today's opinion unveils additional fact issues to be addressed before vacation relief may be granted. Plaintiff *must be afforded an opportunity to present evidence* that would show the existence of those newly required facts. Today's remand, which assures the

---

[54] The dissent does not appear to take issue with the court's treatment of Rule 13's outer limit.

[55] A petition that states a prima facie case is not subject to dismissal, unless it appears beyond doubt that the plaintiff can prove no facts to support the claim. Frazier v. Bryan Memorial Hosp. Authority, 1989 OK 73, 775 P.2d 281; Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957).

plaintiff of that opportunity, is indeed a constitutional imperative.[56]

E.

ALL PARTIES MUST BE AFFORDED AN OPPORTUNITY TO PRESENT EVIDENCE ON DISPUTED FACT ISSUES BEFORE A JUDGMENT MAY BE VACATED IN A PROCEEDING BROUGHT PURSUANT TO THE PROVISIONS OF §1031.

¶40 Defendants complain that error was committed in the nisi prius order vacating the Patel I judgment because they were not afforded an evidentiary hearing. Instead, *only* oral arguments were presented on the single misconceived motion for summary judgment. Defendants assert that the provisions of 12 O.S. 1991 §1034 require an evidentiary hearing before a judgment may be vacated pursuant to §1031(4).[57] Although we agree that an opportunity to offer evidence on disputed fact issues must be afforded the parties in a vacation proceeding, we disagree that it is §1034 that imposes this requirement. *Section 1034*

---

[56] Minimum standards of due process require that persons be given notice and an opportunity to be heard before any of their substantial rights may be altered or affected. Matter of Estate of Pope, 1990 OK 125, ¶3, 808 P.2d 640, 642-643; Snyder v. Smith Welding & Fabrication, 1986 OK 35, ¶5, 746 P.2d 168, 170; Armstrong v. Netherlands Pipeline Const. Co., 1968 OK 170, ¶12, 447 P.2d 762, 764; Smith v. State Industrial Court, 1965 OK 179, ¶11, 408 P.2d 317, 320-321; McMinn v. State, 1961 OK 280, ¶10, 366 P.2d 954, 957.

[57] The provisions of 12 O.S. 1991 §1034 are: "The Court may first try and decide upon the grounds to vacate or modify a judgment or order before trying or deciding upon the validity of the defense or cause of action."

authorizes, but does not require, an evidentiary hearing. It merely speaks to the issues that the party seeking vacation must meet and sets up the order in which the court may consider the parties' contentions. *The court must determine that there is a statutory ground for vacating the judgment and that the petitioner has an available defense or cognizable cause of action.*

¶41 Nevertheless and apart from §1034, where the dispositive issues in a vacation quest call upon the trial court to resolve one or more fact controversies, an opportunity to adduce proof must be provided. The Constitution inexorably commands that no one's rights are to be adversely affected by judicial process that takes place in the absence of notice and a full and fair opportunity to be heard.[58] In the vacation proceeding under review today, the court is called upon to determine fact issues relating to fraud as well as fact issues relating to the prudential restrictions on vacating judgments which are set forth in today's opinion. On these disputed fact issues the parties must be afforded an opportunity to present evidence.

¶42 An appellate court cannot make first-instance decisions.[59] In the battle of motions waged by the parties

---

[58] *See*, PFL Life Ins. Co. v. Franklin, 1998 OK 32, ¶9, 958 P.2d 156, 162.

[59] When necessary finding of facts and conclusions of law are absent, the case must be remanded with directions that they be made by the trial court. Toxic Waste Impact Group, Inc. v. Leavitt, 1994 OK 148, 890 P.2d 906, 913; Dyke v. Saint Francis Hospital, Inc., 1993 OK 114, 861 P.2d 295, 300, n.13; Teel v. Teel, 1988 OK 151, 766 P.2d 994, 999, n.19; American Ins. Ass'n v. American Nat. Bank, 1984 OK 13, 680 P.2d 983, 993; Matter of Estate of Bartlett, 1984 OK 9, 680 P.2d 369, 377; Davis v. Gwaltney, 1955 OK 362, 291 P.2d 820, 824.

in this case, unresolved fact issues went undetected. The trial court's failure to receive evidence on these disputed issues makes her decision (to vacate the Patel I judgment) premature and constitutes an abuse of discretion. We therefore remand Cause No. 90,489 to the court of first instance to undertake an inquiry into, and make its determination on, the disputed critical fact issues.[60]

---

[60] In sum, the court's affirmance of her nisi prius victory (in Cause No. *90,489*) is *not Patel's due on this record.* Submission of her quest for relief upon deficient proof *mandates today's reversal.* Upon Patel must fall the loss from the found probative infirmity. Hers was the duty to supply the evidentiary basis for the vacation order. Gavin v. Heath, 125 Okl. 118, 256 P.745, 746 (1927). One on whom the law casts the burden of producing proof for the relief sought bears the risk of failed (or substandard) production. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 272, 114 S.Ct. 2251, 2255-2256 129 L.Ed.2d 221 (1994). Patel's defeat by today's pronouncement *need not be irreversibly final.* Remand for further nisi prius proceedings *will* afford her the opportunity to supply the deficiency. The proof she needs, now absent from the record, does not appear to be clearly beyond her ability to secure upon remand. Sherrill v. Sovereign Camp, W.O.W., 184 Okl. 204, 86 P.2d 295, 296 (1939); Guinn v. Church of Christ of Collinsville, 1989 OK 8, 775 P.2d 766, 775.

IV

NO CIVIL REMEDY IS AVAILABLE FOR LITIGATION-RELATED MISCONDUCT[61]

¶43 In the second case under review today, we are asked to reverse the dismissal of Patel's tort action for failure to state a claim. In that action damages were sought for defendants' alleged fraud, deceit, perjury, and spoliation of evidence in the Patel I trial. In reviewing a *nisi prius* disposition by dismissal, the issues stand before this court for *de novo* review. The purpose of a motion to dismiss is to test the legal sufficiency of the pleadings, not to evaluate the underlying facts.[62] The question

---

[61] The court's holding today is not governed by the civil remedy contemplated by the provisions of the criminal statute found at 21 O.S. 1991 §575. Its provisions state:

> "Every attorney who, whether as attorney or as counselor, who:
>
> 1st, is guilty of any deceit or collusion, or consents to any deceit or collusion with intent to deceive the court or any party; . . . is guilty of a misdemeanor; and, in addition to the punishment prescribed therefor by this code, he forfeits to the party injured treble damages, to be recovered in a civil action."

By its terms, §575 *is not applicable to this case.* The civil remedy authorized there *requires an antecedent criminal conviction.* No criminal proceeding has been instituted against these defendants. We express no opinion in regard to the viability of a civil action if one is brought pursuant to the terms of this statute.

[62] Zaharias v. Gammill, 1992 OK 149, ¶6, 844 P.2d 137, 138. According to Professor Fraser, a petition is sufficient under the Oklahoma Pleading Code if it discloses "the existence of the necessary elements of a legally recognized claim or cause of action." George B. Fraser, The Petition Under the New Pleading

before us is hence whether, taking all of plaintiff's allegations as true, she is precluded from recovering as a matter of law. We hold that she is barred.

¶44 In *Cooper v. Parker-Hughey,*[63] this court held that in this state no civil action may be maintained for damages caused by perjury, whether the petition for damages refers to the tort as perjury or as fraud or deceit. The court's holding in *Cooper* reasoned that perjurious testimony constitutes a fraud or deceit on the finders of fact and on the judicial system as a whole, and not on an individual litigant. The court looked to the common law, the Oklahoma Constitution, and to Oklahoma statutory provisions. It found there no support for the adoption of

---

Code, 38 OKLA. L. REV. 245, 246 (1985). A petition can generally be dismissed only for lack of any cognizable legal theory or for insufficient facts under a cognizable legal theory. Lockhart v. Loosen, 1997 OK 103, ¶4, 943 P.2d 1074, 1077; Washington v. State ex rel. Department of Corrections, 1996 OK 139, ¶7, 915 P.2d 359, 361; Indiana National Bank v. State Department of Human Services, 1994 OK 98, ¶2, 880 P.2d 371, 375. A motion to dismiss for failure to state a claim upon which relief can be granted will not be sustained unless it should appear without doubt that the plaintiff can prove no set of facts in support of the claim for relief. A-Plus Janitorial & Carpet Cleaning v. The Employers' Workers' Compensation Association, 1997 OK 37, ¶9, 936 P.2d 916, 922; National Diversified Business Services, Inc. v. Corporate Financial Opportunities, Inc., 1997 OK 36, ¶9, 946 P.2d 662, 665; Delbrel v. Doenges Bros. Ford, 1996 OK 36, ¶3, 913 P.2d 1318, 1320. The court must take as true all of the challenged pleading's allegations together with all reasonable inferences which my be drawn from them. Great Plains Federal Savings and Loan Association v. Dabney, 1993 OK 4, ¶2, n.3, 846 P.2d 1088, 1090, n.3.

[63] 1995 OK 35, 894 P.2d 1096.

a tort remedy to provide damages for perjury. To the extent Patel's petition relies on perjurious testimony as the basis of her claim for damages, whether denominated perjury, fraud, deceit, or "prima facie tort", the petition fails to state a claim. It was properly dismissed.

¶45 Patel also claims damages for spoliation of evidence, denominating her claim either spoliation of evidence or prima facie tort. Neither spoliation of evidence nor prima facie tort (for acts constituting spoliation of evidence) has ever been recognized by this court as actionable. Because the conduct complained of in this action does not present a case of spoliation of evidence, we need not consider today whether that tort should be recognized as a viable cause of action in this state.

¶46 Spoliation is defined as "[t]he destruction of evidence. . . . The destruction, or the significant and meaningful alteration of a document or instrument."[64] Spoliation occurs when evidence relevant to prospective civil litigation is destroyed, adversely affecting the ability of a litigant to prove his or her claim. Although a few jurisdictions have adopted the tort of spoliation,[65] most of the courts which have considered the issue have refused

---

[64] BLACK'S LAW DICTIONARY 1257 (5th ed. 1979).

[65] Bondu v. Gurvich, 473 So.2d 1307 (Fla. Dist. Ct. App. 1984), *rev. denied*, 484 So.2d 7 (Fla.1986); Hazen v. Municipality of Anchorage, 718 P.2d 456 (Alaska 1986); Viviano v. CBS, Inc., 251 N.J.Super. 113, 597 A.2d 543 (1991), *cert. denied*, 127 N.J. 565, 606 A.2d 375 (1992); Smith v. Howard Johnson Co., 67 Ohio St.3d 28, 615 N.E.2d 1037 (1993).

to recognize spoliation as an independent cause of action in tort.[66]

¶47 No destruction or alteration of a document or instrument took place in this case. The allegedly wrongful conduct here consists of defendants' failure to respond fully in the course of discovery and of the oral misrepresentation at trial by defendants' attorney as to the existence of a document in Patel's credentialing file. Adequate remedies for this conduct exist. One such remedy, a vacation quest, Patel is currently pursuing. If she is successful in vacating the Patel I judgment, discovery or other sanctions for the defendants' litigation-related misconduct in the original case may, if warranted, be imposed in the reopened case. Apart from remedies available within the existing case, a party aggrieved by litigation-related misconduct may seek to invoke sanctions available under the criminal law and, in the case of attorney misconduct, by bar disciplinary measures.[67] The trial court correctly dismissed this claim.

V

SUMMARY

¶48 The provisions of 12 O.S.1991 §1031 et seq. provide a legislatively created mechanism for relief from judgments. The fourth ground for relief under §1031 – fraud practiced by the successful party in obtaining the judgment – is available *whether the alleged fraud is regarded*

---

[66] Trevino v. Ortega, 969 S.W.2d 950 (Tex. 1998) and cases cited therein at 952.

[67] *See, e.g.* 21 O.S. 1991 §575.

as extrinsic or intrinsic. Patel's allegations fall within the meaning of §1031(4). It remains for her to convince the nisi prius court that she was unable at any point in course of the Patel I trial proceedings to neutralize the adverse effects of the fraud, and that the fraud so contributed to reaching the verdict against her that in its absence she would probably have prevailed on her cause of action. Finally, while we acknowledge the seriousness of litigation-related misconduct such as that alleged in Patel III, we explicitly decline today to provide redress for that civil harm *through the adoption of a new tort.* The available remedies, including the relief Patel seeks in the Patel II proceeding, are sufficient.

¶49 THE TRIAL COURT'S POSTJUDGMENT ORDER IN CAUSE NO. 90,489 VACATING THE PATEL I JUDGMENT IS REVERSED AND THE CAUSE REMANDED FOR FURTHER PROCEEDINGS TO BE CONSISTENT WITH TODAY'S PRONOUNCEMENT; THE TRIAL COURT'S ORDER OF DISMISSAL IN CAUSE NO. 89, 582 IS AFFIRMED.

¶50 **HODGES, LAVENDER, OPALA, WILSON, KAUGER,** and **WATT,** JJ., concur;

¶51 **HARGRAVE,** V.C.J., concurs in result;

¶52 **SUMMERS,** C.J., and **SIMMS,** J., concur in part and dissent in part.

SIMMS, J., CONCURRING IN PART AND DISSENTING IN PART:

I agree with the majority that no civil remedy for the alleged litigation misconduct is available and I concur in affirming the trial court's dismissal of Patel III, case number 89,582. Additionally, I agree with the majority that the trial court abused its discretion in vacating the judgment in Patel I, case number 90,489. That judgment was final and plaintiff's allegations in support of her vacation petition, even if proven, were insufficient to sustain her action and the trial court's decision in her favor. I would not remand the matter for an additional hearing, however. Instead I would reverse the trial court's judgment in favor of Patel and direct the trial court to enter judgment in favor of the defendants. Plaintiff bore the burden to prove her case. See e.g. Gavin v. Heath, 125 Okl. 118, 256 P. 745 (1927). She had the opportunity to establish her case but, by any and all measures, she failed to do so, and the trial court's ruling in her favor was clearly an abuse of discretion. The defendants' motion to dismiss should have been sustained. The majority's stated concern with the denial of a sufficient opportunity for **defendants** to put on their case in defense of the petition to vacate is, therefor, strained and unconvincing and lends no credence to this disposition. The majority errs in granting Patel this additional chance to try and make her case against defendants, and I fear this "new" view of fraud created here to govern the trial on remand will create much confusion in this previously settled area of law.

SUMMERS, C.J., Concurring in part and dissenting in part.

¶1 I concur in the Court's opinion disposing of appeal no. 89,582.

¶2 As to appeal no. 90,489, I concur with most of what the Court has said regarding the law applicable to that matter. I dissent, however, from remand. Defendants were given the opportunity to offer further submissions, and stood silent. I believe at that point in time the trial court and all parties justifiably concluded that the matter stood fully submitted. I would affirm the trial court.

APPENDIX B

IN THE DISTRICT COURT IN AND FOR
TULSA COUNTY

STATE OF OKLAHOMA

URVASHI B. PATEL,	)	
	)	
Plaintiff,	)	Case No. CJ 93-5291
vs.	)	
OMH MEDICAL CENTER, INC., an Oklahoma corporation, ST. FRANCIS HOSPITAL, INC., an Oklahoma corporation, and JOHN B. STEVENS, an individual,	)	
Defendants.	)	

ORDER ON PLAINTIFF'S PETITION TO VACATE JUDGMENT IN PART

(Filed Nov. 14, 1997)

The Court has reviewed and considered the parties' submissions on Plaintiff's Petition to Vacate Judgment in Part, including their briefs, affidavits, exhibits, oral arguments, and case authority.

After review of the materials presented, the Court finds that the Plaintiff's Petition to Vacate Judgment in Part should be granted. The bench conference reported on pages 612-617 of the Trial Transcript of February, 24, 1995, shows that Plaintiff's counsel voiced specific concerns about the existence in the Plaintiff's credentialing file of a notation from either Dr. Rush or Dr. Carter

responding to a negative evaluation [Defendant's Exhibit 1] sent by Dr. Matson at Scotland Memorial Hospital where Plaintiff was previously employed. It is clear from the statement by Plaintiff's counsel that he was inquiring about Defendant's Exhibit 1 not being the complete documentation on this negative reference.

The following discussion occurred in the bench conference:

> THE COURT: I want to know what the status of the file is because if there is something that pertains to this particular evaluation then I think Cliff is entitled to have that produced to show the general circumstances under which it was produced. So without the complete file, you know, I can't really tell that because I think you are entitled to get it in if it is not complete or if there is something in the file that explains this more in detail then he is entitled to get that in too.
>
> MR. HENRY: Judge, how could it be incomplete? Do you read anything in here that would indicate this is not complete? [Page 614, lines 13-24]
>
> . . .
>
> THE COURT: . . . The point is not that this document [Defendant's Exhibit 1] is incomplete but that there may be something in the file that references this document that explains it or further modifies it in some respect. He [Plaintiff's counsel] is entitled to have that produced too because otherwise I think it leaves a false intention and remind the jury [*sic* – should read "false impression in the minds of the jury"] ir regard to instances if Doctor wrote back or

> something or somebody else wrote the specific reference to this evaluation form and submitted by – I can't read this guy's name.
>
> MR. RIBNER: Matson.
>
> THE COURT: Matson. He is entitled to have that produced. It is not presenting us from being admirable [*sic* – should read "preventing it from being admissible"], it is just that it may not be admitted in its current form. If it doesn't show it totally [*sic* – "the totality"] of the circumstances under which it was.
>
> THE COURT: Present is [*sic*] in the file.
>
> MR. HENRY: *There is nothing in the file of that nature.* [Emphasis added.] There are contradictory references from that city. [Page 615, lines 3-20]

Mr. Henry made a specific representation to the Court that there was nothing in the file of the nature about which the Court was clearly concerned. This representation was, in fact, false, there being in the file a typed memorandum by Karen Legg, OMH's risk manager, who kept the credentialing files, regarding a call from Dr. Parkes at Scotland Memorial, a memorandum on this very point and falling squarely within the category sought by the Court. Dr. Parkes called specifically to refute Dr. Matson's negative reference and to explain the circumstances under which Dr. Matson criticized the Plaintiff's professional conduct, a negative evaluation which Dr. Parkes stated was "strictly of a personal nature" and constituted a "lack of professionalism on Dr. Matson's part." [Legg memorandum] Mr. Henry made the representation knowing that the Court was relying on

it as a true representation of the state of the file which was known to Mr. Henry but not to Mr. Ribner or the Court.

If Mr. Henry had responded that there was something in the file of that nature, the Court would have required it to be produced or would have excluded Defendant's Exhibit 1 on the basis that its admission, absent the additional file material, would mislead the jury on the exact point on which Mr. Henry offered it, that the presence of a negative reference in the file was no impediment to a doctor's future employment.

Mr. Henry's misrepresentation to the Court and opposing counsel constitutes grounds under 12 O.S. Section 1031(4) to vacate the judgment on Plaintiff's tort claims entered on the jury verdict.

Plaintiff's Motion to Amend the Petition to Vacate is rendered moot by this decision and the Court will therefore not address the merits of that motion.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Plaintiff's Petition to Vacate Judgment in Part is granted and the judgment entered March 22, 1995, on Plaintiff's tort claims is hereby vacated and set aside.

Dated: November 14, 1997

/s/ Jane P. Wiseman
Jane P. Wiseman
District Judge

CERTIFICATE OF MAILING

I hereby certify that on the 14th day of November, 1997, a true and correct copy of the foregoing was mailed

with postage prepaid thereon to: Mr. Clifford N. Ribner, 406 South Boulder, Suite 800, Tulsa, Oklahoma 74103; and Ms. Vivian Hale and Mr. Larry D. Henry, Gable, Gotwals, Mock, Schwabe, Kihle, Gaberino, 100 West Fifth, Tulsa, Oklahoma 74103.

/s/ Carla K. Illegible
Deputy Court Clerk

APPENDIX C

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

Thursday, September 30, 1999

THE CLERK IS DIRECTED TO ENTER THE FOLLOWING ORDERS OF THE COURT:

90,489 Urvashi B. Patel v. OMH Medical Center, Inc., an Oklahoma corporation, Saint Francis Hospital, Inc., an Oklahoma corporation and John B. Stevens, an individual.

89,582 Urvashi B. Patel v. OMH Medical Center, Inc., an Oklahoma corporation, Saint Francis Hospital, Inc., an Oklahoma corporation, Larry D. Henry, an individual and Arrington, Kihle, Gaberino & Dunn, Inc.

Petitions for rehearing are denied.

CONCUR: Hargrave, V.C.J., Hodges, Lavender, Opala, Kauger, Watt, JJ.

DISSENT: Summers, C.J., Simms, J.

* * *

(Signed illegible)
Chief Justice

APPENDIX D

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

URVASHI B. PATEL PLAINTIFF/APPELLEE vs. OMH MEDICAL CENTER, INC., an Oklahoma corporation, ST. FRANCIS HOSPITAL, INC., an Oklahoma corporation and JOHN B. STEVENS, an individual, DEFENDANTS/ APPELLANTS.	)	No. 90489 Trial Court No. CJ 93-05291

PLAINTIFF DR. PATEL'S PETITION FOR REHEARING AND BRIEF IN SUPPORT

(Filed May 17, 1999)

Plaintiff, Dr. Patel, the Appellee in this case ("Plaintiff") Petitions this Court to Rehear this matter to withdraw the Opinion in this case filed herein on April 27, 1999, and affirm Judge Wiseman's ruling, pursuant to Oklahoma Supreme Court Rule 1.13, for the reasons stated below.

SUMMARY OF THE ARGUMENT

In failing to affirm Judge Wiseman's ruling in this case ("Patel II"), the Court erred in each of the following respects: (1) It failed even to consider precedents of long-

standing of both this Court and the United States Supreme Court, which are both directly contrary to the Court's Opinion and literally pillars of the entire American judicial system. *State ex rel. Commissioners of Land Office v. Jones*, 198 Okla. 1987, 176 P.2d 992 (1947); *Abernathy v. Huston*, 26 P.2d 939, 166 Okla. 184 (1933); *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 64 S.Ct. 997, 88 L.Ed. 1250 (1944). Such cases are directly applicable here and, unless overruled, clearly mandate the affirmance of Judge Wiseman's decision because the knowing, carefully planned fraud committed on the Trial Court by Defendants here – fact findings this Court leaves completely undisturbed in its Opinion – was perpetrated with the active complicity of Defendants' lawyers. Indeed, (2) on the Record, including Judge Wiseman's undisturbed fact findings, before this Court, the Due Process Clause of the federal Constitution itself *requires* the affirmance of Judge Wiseman's decision because Defendants' attorneys *participated* in the fraud on her and Defendants failed to meet their burden of proving to Judge Wiseman the *immaterialty* of their frauds, a burden which is exclusively *theirs'* under these circumstances. Additionally, (3) the Court failed to consider a number of facts, clearly contained in the Record, and their evidentiary significance which, even under this Court's erroneous view of applicable law, require the affirmance of Judge Wiseman's decision.

ARGUMENT

A. THE COURT'S OPINION IMPLICITLY REVERSES LONG-STANDING PRECEDENTS WHICH UNAMBIGUOUSLY REQUIRE AFFIRMANCE OF JUDGE WISEMAN'S DECISION WHERE, AS HERE, THE FRAUD PERPETRATED ON THE COURT WAS EFFECTED BY AN ATTORNEY

Nowhere in its Opinion does this Court even suggest that any significance should be ascribed to the fact that here the fraud was perpetrated not simply by a party alone, nor even by a testifying witness, but rather by parties with *the active complicity of their attorneys*. In requiring the Trial Court to consider whether Plaintiff and her counsel exercised sufficient due diligence in investigating such fraud, the Court effectively imposes a new *duty of investigation* of opposing counsel. Additionally, the Court effectively eviscerates any duty on Mr. Henry's and his law firm's part to Plaintiff or the Court *to disclose* either their misstatements or the fact that such misstatements had occurred.

All such results have long been *absolutely prohibited* by both this Court and the United States Supreme Court. *Abernathy v. Huston*, supra; *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, supra (involvement of attorney in plan to fabricate false evidence becomes fraud on the court, *inherently voidable* without regard to statutes of limitations, laches, defrau ed party's diligence in uncovering the fraud and without regard to the materiality of the fraud).

In *Hazel-Atlas*, the defrauding party's attorney was involved in creating and publishing a phony article

which was misleadingly used by his clients in subsequent litigation. *Solely* because of the attorney's active involvement in such scheme, the Supreme Court ruled, directly contrary to this Court, that the judgment therein was inherently voidable. The Court *expressly precluded any* obligation by the defrauded party to make any further showing to obtain relief from the judgment *beyond* the proof of the lawyer's complicity in the fraud.

Indeed, in language unmistakably applicable here, the Supreme Court *explicitly rejected* any notion that the moving party should have to prove its due diligence (which, in fact was probably *lacking* in that case), by ruling as follows:

> "Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud." 322 U.S. at 246, 64 S.Ct. at 1001.

The Court went on *specifically to reject* any notion that the moving party needed to prove the outcome-determinativeness of the fraud by stating as follows:

> "But we do not think the circumstances call for such an attempted appraisal. [The defrauding party's] officials and lawyers thought the article material. . . . Having lost their infringement suit in the District Court wherein they did not specifically emphasize the article, they urged the article upon the Circuit Court and prevailed. *They are in no position now to dispute its effectiveness."* [emphases added] 822 U.S. at 247, 64 S.Ct. at 1001 - 1002.

The Supreme Court could hardly have been clearer in stating that this principle applied *solely* because, like here, of attorney-complicity in the fraud:

> "Every element of the fraud here disclosed demands the exercise of the historic power of equity to set aside fraudulently begotten judgments. This is not simply a case of a judgment obtained with the aid of a witness who, on the basis of after-discovered evidence, is believed possibly to have been guilty of perjury. Here, even if we consider nothing but Hartford's sworn admissions, we find a deliberately planned and carefully exeuted scheme to defraud not only the patent office but the Circuit Court Of Appeals. . . . Furthermore, *tampering with the administration of justice* in the manner indisputedly shown here involves far more than an injury to a single litigant. It is a wrong against the institution set up to prevent and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. [emphases 3 added]" 322 U.S. at 245-246, 64 S.Ct. at 1001.

The defrauding activities of Defendants' lawyers in the present case were substantially *more* egregious than those involved in *Hazel-Atlas*.

Here, when *specifically questioned* whether they were producing a complete document, Defendants' attorneys asserted that they were in fact doing so, thereby denying the fact of their concealment of the *larger* document out of which such Exhibit was a mere fragment. Moreover, Mr. Henry *directly lied* repeatedly to the Court concerning Plaintiff's file and other, specific questions about it posed to him by the Court. See also *Pumphrey v. K. W. Thompson*

Tool Co., 62 F.3d 1128 (9th Cir. 1995) (Participation by attorney-employee of party in scheme fraudulently to withhold production of damaging evidence in discovery results in inherently voidable fraud on the Court, explicitly following *Hazel-Atlas).*

Here, there can be no question of Defendants' lawyers' *active participation* in the fraud on the Court, which fraud continues to this very day by virtue of their continued, explicit *denials* that they committed any such fraud in the original proceeding, even in the briefs filed by them, co-authored by Mr. Henry himself, in this very Court. Under such circumstance, even if the Court doubted the importance of the surrounding, refuting, documents attached to Defendants' Exhibit 1 which Mr. Henry lied about, Plaintiff's due diligence in finding out about and pursuing them and any other matter, the judgment dismissing Plaintiff's tort claims is clearly, inherently voidable *under Hazel-Atlas* simply because of the active involvement of Defendants' attorneys in perpetrating the fraud on the Court.

Oklahoma law has long been completely in accord with this. *State ex rel. Commissioners of Land Office v. Jones; Abernathy v. Huston,* supra. Each such case granted the moving party the vacation of judgment sought, *without discussion* of the effect of the injuring party's actions on the triers of fact in the earlier proceeding, the due diligence of the defrauded party or the timeliness of the defrauded party's complaint about such, nor whether the fraud was intrinsic or extrinsic, due simply to the active collaboration of the injurying parties' attorneys in such fraud. *Abernathy v. Huston,* could hardly be clearer in holding, *contrary* to this Court's Opinion, that once it is

shown that a party's attorneys are involved in perpetrating a fraud on the Court, the party seeking to undo such fraud by vacating the judgment *need not* show such fraud to have been outcome-determinative, nor even material; instead, he need only show that *he had made a prima facie case* supporting his position in the earlier case.

It is extraordinary that, though the Court's Opinion implicitly repudiates *all* of these cases, *none* of them is even *mentioned* therein, notwithstanding the fact that such cases were urged on this Court by Plaintiff in her Brief and in numerous Trial Court documents contained in the Record. It is clear that Judge Wiseman relied on such cases, and correctly so, in her ruling.

At a minimum, if it is the intention of the Court actually to overrule precedents of such weight and venerability, the Court should explicitly state both that it is doing so and its reasons for so doing.

In the present case, there can be no doubt that Plaintiff made out a prima facie case at trial since the Defendants then demurred to her case, Judge Wiseman overruled such demurrer and Defendants do not now even suggest any incorrectness in such overruling.

Accordingly, it is beyond dispute that Plaintiff has proven vastly more than is required under *Hazel-Atlas* and Abernathy and *Jones* for this Court to affirm Judge Wiseman's ruling.[1] If it is the decision of this Court to

---

[1] While suggesting that Judge Wiseman should reconsider her denial of any further hearings to Defendants, the Court also notes in its Opinion that no further such hearings are necessarily *required* and it is clear that the state of the evidence

reverse both *Abernathy* and *Jones*, it should do so explicitly and prospectively only.

Hazel-Atlas, as a review of its shephard citation clearly reveals, has been followed on *all* occasions when applicable, as here, in every American jurisdiction, prior to this Court's Opinion, and has never even been seriously questioned, let alone reversed. Simply by way of example, consider each of the following cases which follow *Hazel-Atlas* religiously, or reach an identical result: *Pumphrey v. K.W. Thompson Tool Co.*, 62 F.3d 1128 (9th Cir 1995); *Averbach v. Rival Manufacturing Co.*, 809 F.2d 1016 (3rd Cir. 1987); *Browning v. Navarro v. Holloway*, 826 F.2d 335 (5th Cir. 1987); *Dausuel v. Dausuel*, 195 F.2d 774 (D.C. Cir. 1952); *In re: Intermagnetics America, Inc. et al. v. China International Trust and Investment Corporation*, 926 F.2d 912 (9th Cir. 1991); *Kupferman v. Consolidated Research and Manufacturing Corporation*, 459 F.2d 1072 (2nd Cir. 1972); *Leber-Krebs, Inc. v. Capitol Records*, 779 F.2d 895 (2nd Cir.

---

before Judge Wiseman was more than sufficient to permit her, within her discretion, to enter her ruling. The fact is, Judge Wiseman granted Defendants an *extensive* hearing in which, unlike most summary judgment hearings, *all fact witnesses to the fraud were physically present* – the undersigned, Larry D. Henry and Judge Wiseman herself. *See also*, in this regard, the very recent case of *Groseclose v. City of Tulsa*, 1998 OK 112 (where trial judge sits as trier of fact, as here, requirement of "evidentiary hearing" is met when such fact finder *alone* determines that she has heard enough: "in an action of equitable cognizence there is a presumption in favor of the trial court's findings and they will not be set aside unless the finding is against the clear weight of the evidence." *Mock v. Stricklin*, 315 P.2d 247 (Okla. 1957) 1998 OK 112 ¶18.

1985); *Sutter v. Eagerly*, 189 S.W.2d 284 (MO 1945); *Publicker v. Shallcross*, 106 F.2d 949 (3rd Cir. 1939); *Toscano v. Commissioner of Internal Revenue*, 441 F.2d 930 (9th Cir. 1971).

B. FAILURE TO AFFIRM JUDGE WISEMAN'S RULING ON THE RECORD AS IT EXISTS IS A VIOLATION OF PLAINTIFF'S CONSTITUTIONAL DUE PROCESS RIGHTS.

Paragraph 38 of the Opinion provides as follows:

> "in order to vacate the earlier judgment, *the petitioner must* (1) show that he (or she) acted without delay in asserting her rights after discovering the fraud, (2) establish that he (or she) used diligence in the original action in trying to discover and expose the fraud (3) provide clear and convincing evidence of the fraud and (4) demonstrate that there is a substantial likelihood that a new trial will have a different result."

The Court appears to require this identical proof by the defrauded, moving party, regardless whether the fraud is effected by an officer of the Court and regardless of the willfulness of the fraud. Decisions of the United States Supreme Court clearly establish that imposing such burden on Plaintiff to vacate the judgment is greater than the Constitution permits in these circumstances. In short, this is one of those rare cases where, even if this Court *wanted* to impose the extra burdens on a defrauded party mandated by ¶38 of its Opinion, it lacks the power or prerogative to do so under the Due Process Clause of the federal Constitution. *Peralta v. Heights Medical Center, Inc.*, 485

U.S. 80, 108 S.Ct. 896, 99 L.Ed.2d 75 (1988); *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d. 705 (1967); *Brown v. Borg*, 951 F.2d 1011 (9th Cir. 1991), each of which is discussed below.

Constitutionally-mandated Due Process is accorded a litigant *only* if he is provided both (1) adequate notice, *Pennoyer v. Neff*, 95 U.S. 714 (1878), and (2) an opportunity to be heard, *Fay v. Noia*, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963). The absence of either of these attributes results in a judicial process whose integrity is so tainted that a state simply has no valid interest in the finality of any judgment obtained thereby and *may not* interpose even the most minimal, sensible-appearing requirements for a party to meet in order to set such a judgment aside, once the lack of integrity of the procedures which gave rise to it is itself, as here, established. *Peralta v. Heights Medical Center, Inc.*, supra.

Peralta involved a final judgment which had been obtained in Texas without sufficient constitutionally-required notice to the debtor. Under Texas law, the debtor was required prove *both* that he would have had a valid defense to the original action, *and* the fact of the judgment's constitutional infirmities, in order to set it aside. The debtor in that case lacked any such defense and, accordingly, the Texas courts refused to vacate the judgment, based on such "no harm no foul" rule, notwithstanding the judgment's clear constitutional infirmity.

A unanimous U.S. Supreme Court reversed, ruling that, once the constitutional infirmity *alone* had been proven, "*only* wiping the slate clean . . . would have restored the petitioner to the position he would have

occupied had due process of law been accorded to him in the first place.[citation omitted] [emphasis added]". 485 U.S. at 87, 108 S.Ct. at 900.

In the present case, Judge Wiseman found that the integrity of Plaintiff's hearing in *her own* Court was tainted due to fraud perpetrated on her *and* Plaintiff by Mr. Henry, an officer of the Court, who knowingly used his status as such to effect such damage. Requiring Plaintiff to prove *more* than the mere fact of such lawyer-perpetrated fraud and the already-adjudicated damage to the original trial's integrity is simply not Constitutionally permissible (although it would be in the usual case of fraud perpetrated by a mere witness, as opposed to an attorney). *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); *Brown v. Borg,* 951 F.2d 1011 (9th Cir. 1991). These cases clearly require that when a prosecutor – that is, an attorney for the State – commits prosecutorial misconduct even far less egregious than that which Judge Wiseman has already ruled Defendants and Mr. Henry did here, it is the misbehaving – i.e., the *defrauding* – party who bears the burden of proving the *immateriality* to the outcome of his fraud in order to *avoid vacation* of the judgment.

This rule applies notwithstanding the fact that the *general* burden of proof in habeas corpus proceedings is imposed on the criminal defendant, who must prove the fact of the prosecutor's misconduct *beyond a reasonable doubt. Chapman.* Id. Once proven, quite simply, such prosecutorial (i.e. opposing lawyer) misconduct *shifts* the burden to the State, as a *minimal* Constitutional requirement, of proving *the immateriality* (that is, the utter *lack* of

outcome-determinativeness) of the fraud, *in order to preserve the conviction* obtained against the criminal defendant.

Of additional note, in such habeas corpus cases, if the State is unable to bear its burden of proving such immateriality, not only is the defendant relieved of any *further* proof to obtain a vacation of his conviction, in the usual case of serious prosecutorial misconduct, such as fraud, the State is *forbidden to reindict* him under the Double Jeopardy clause of the Constitution.

It is apparent that states have an *even greater* sovereign interest in preserving the finality of such criminal convictions than they do in preserving the finality of judgments in civil cases such as that involved here. Such Due Process requirements apply *equally* and identically in civil, as in criminal, litigation. *See O'Neal v. McAninch*, 5 13 U.S. 432, 115 S. Ct. 992, 130 L.Ed.2d 947 (1995). Accordingly, there can be no question but that the remand instructions contained in this Court's ¶38 violate the Due Process Clause of the federal Constitution.

Hazel-Atlas does not specifically discuss what is constitutionally *required* in order to set aside a judgment obtained with attorney-complicit fraud. instead, it simply dictates what is mandated in the federal system *without regard* to the outer limits of constitutional permissiveness in such matters. As indicated above, prior to this Court's Opinion, *Hazel-Atlas* has been followed religiously throughout all American jurisdictions in cases involving attorney-complicit fraud.

Habeas Corpus cases such as *Borg* and *Chapman* address the question not what states simply *ought* to

require to permit the vacation of such judgments, but, rather, the outer limits of what the Constitution permits them to do to *avoid* vacation of voidable judgments. *No such cases* permit a state to impose the multiple burdens established by this Court in ¶38 of its Opinion in order for the *moving* party to set aside a final judgment obtained with attorney-complicit fraud. Specifically, such cases *mandate* the complete vacation of such judgment, once such attorney-complicit fraud *alone* is shown, as here, *without any further showing whatsoever* by the moving party, although the defrauding party can *prevent* judgment vacation if it is able to prove the utter *immateriality* of its fraud.

Thus, there is, in fact, very little difference between what *Hazel-Atlas* requires, and what the Constitution permits, in these circumstances: since Plaintiff *has already proven* the attorney-complicit fraud of Defendants, and Judge Wiseman, on more than sufficient evidence, found such fraud to have been material *to her*, and since Defendants were utterly unable to prove the *immateriality* of such fraud, no further showing by Plaintiff may be required under the Constitution. Accordingly, Judge Wiseman's ruling must be affirmed, consistent with the requirements of Due Process, without Defendants being afforded any further hearing in this case.

Judge Wiseman's ruling, based on the Record already before this Court, must also be affirmed because of the following, additional considerations: in the habeas corpus cases, the trial judge making the determinations concerning whether to vacate a conviction due to prosecutorial misconduct is rarely, if ever, the *original* trial judge, but

rather, usually, a federal court reviewing state court proceedings.

In the present case, Judge Wiseman *was herself present throughout* the original trial and, accordingly, *uniquely able* to ascertain the materiality of Defendants' fraud on the jury and herself, including the effect *the knowledge of the fraud itself*, which Mr. Henry *also* fraudulently concealed, *would* have had on her *own* rulings at trial, as well as the jury's determination. For example, in its Opinion, this Court itself acknowledges that Judge Wiseman may well have been within her prerogative to have simply entered a default judgment against Defendants pursuant to 12 O.S. 1996 § 3237(E) *at trial* had she then known of Mr. Henry's fraudulent representations regarding specific questions – that is, Court-ordered *discovery* – posed to him by her herself. At a minimum, she would have been justified in entering orders of substantial issue or evidence preclusion against Defendants due to such serious misconduct. *Hoim-Waddle v. Hawley*, 1998 OK 53 ¶10.

Accordingly, since there is more than sufficient evidence in the record to have supported Judge Wiseman's determination, as the finder of fact and law, favorable to Plaintiff on all necessary matters, this Court should follow its own normal procedures, *Mock v. Stricklin*, 315 P.2d 247 (Okla. 1957), and affirm her decision even though she did not *specifically* address the question whether Defendants had failed to prove the *immaterality* of their and Mr. Henry's fraud.[2]

---

[2] If this Court chooses to disregard its normal rule of mandatory affirmance of the trier of fact's ruling which, as here,

C. EVEN UNDER THE VIEW OF APPLICABLE LAW EXPRESSED IN THE OPINION OF APRIL 27, 1999, JUDGE WISEMAN'S RULING MUST BE AFFIRMED.

Factual Errors In The Opinion

This Court's Opinion contains the following factual errors:

> 1. Defendants did *not*, contrary to the Opinion, notify Plaintiff of their intention to offer their Exhibit I – the Matson Letter – *several days* prior to trial: they did so *on the first day of trial* itself, at which time the undersigned expressly demanded to see the entire file of which such exhibit was a part, pursuant to the Rule of Completeness, with Defendants' counsel in no way indicating that he would fail to produce such file. *See* the PreTrial Order and Docket Sheet in the appeal from Patel I: Defendants failed to list the Matson letter on the PreTrial Order and failed *ever* to file a request to amend such PreTrial Order to add their Exhibit 1 at any time.
>
> 2. Although Defendants sought the admission of their Exhibit 1 on the pretext that it was relevant solely to impeach Plaintiff's expert, they *in fact used* it at trial also to impeach Plaintiff's *own* credibility, with Judge Wiseman

---

is subject solely to abuse of discretion review, in these circumstances, where overwhelming evidence supports Judge Wiseman's ruling, *at an absolute minimum*, on remand, the Court should direct that Defendants have the burden of *disproving* all the matters described in ¶38 of the Court's Opinion if they are to *avoid* vacation, since Plaintiff has already proven Defendants' and Mr. Henry's fraud.

expressly overruling Plaintiff's objection to such use by stating "Once it's in, it's in."

3. Defendants' Exhibit 1 was not simply one, complete document out of many in a larger file of documents others of which had the effect of "refuting" it: it was in fact *physically attached* to all such other documents on the only occasions when it was actually even seen by anyone other than Karen Legg – i.e. the OMH Board of Directors. Accordingly, Defendants' offering of their Exhibit 1 in such form did, as a factual matter, indeed constitute spoliation, as Judge Wiseman ruled they knew, because by *deliberately omitting the remainder of the larger document of which Exhibit 1 comprised but a part*, and by misrepresenting to Judge Wiseman that such document in fact was a complete document in and of itself, Defendants in fact presented both the jury and Judge Wiseman with a *defaced fragment of a document*, the *remainder* of whose contents proved the falsity of the *portion* offered.

4. Defendants' actions in offering their Exhibit 1 and deliberately, fraudulently concealing the remainder of the documents attached to it from both Plaintiff and the Trial Court were, as the Trial Court found, knowing, willful and preplanned with extraordinary care: as clearly shown in the record, *over one year prior* to trial Defendants fraudulently withheld from Plaintiff Minutes of their Board of Directors which would have lead Plaintiff *directly* to both their Exhibit 1 *and* the remaining, refuting documents attached to it and, as Defendants also well knew, and the Trial Court expressly ruled, their Exhibit 1, when seen with its accompanying documents, *proved the direct opposite* of what Defendants

offered it to prove. Accordingly, had Defendants *not* made all their fraudulent representations regarding such documents to both the Plaintiff and Court, the document would have been *utterly useless*, to them at trial and, indeed, counterproductive. Accordingly, their fraud was itself *critical* to the use to which they put it.

5. As this Court explicitly acknowledges, the undersigned's statement quoted in the Opinion in ¶9 was in no respect a waiver of *any* objection whatsoever: exceptions have long been superfluous and *nothing* requires counsel to be rude to a judge who has acted notwithstanding his objections: the statement was no more than such politeness, constituted acquiescence in *nothing*, and is not evidence of any lack of due diligence on Plaintiff's part.

6. The Court fails to note that, in *failing to correct* his knowingly false statements at any time subsequent in the trial or any time subsequent thereto, Mr. Henry not only made fraudulent representations to facilitate both the admission and Defendants' use of their Exhibit 1, he also *fraudulently concealed the fact of his fraud itself.* The Court's own Opinion expressly acknowledges that such failure itself is an *additional* act of material fraud.

7. Even though Judge Wiseman's extraordinarily-detailed and thoughtful Opinion fails *specifically* to address certain questions, it must be affirmed on appeal,under the abuse of discretion standard this Court has expressly adopted in its Opinion, if there is *any* basis in the Record which *could* have supported her making positive findings regarding such questions.

8. In considering whether there was a "substantial likelihood of a change in the outcome" if Mr. Henry's frauds regarding Defendants' Exhibit 1 were corrected – so that the jury saw the documents which proved *precisely the opposite* of what Defendants offered it to prove – it would be appropriate for Judge Wiseman further to consider the effect on her rulings and the jury were they also aware of *the fact of such fraud itself* – with its clearly-probative effect of showing Defendants' own knowledge of the worthlessness their case and

Even under the Court's clearly-erroneous and unconstitutional (as shown above) view of applicable law, the Court is overly-restrictive in its view of what facts Plaintiff could show here to establish the sufficiency of her due diligence: In the present case, *both* Plaintiff *and* the Trial Court herself relied on representations of Defendants' counsel; Plaintiff properly objected to rulings of the Trial Court and, thanks to Defendants' fraudulent *concealment*, had *no evidence* to rebut such frauds as of the time of trial. After trial, but before the judgment became final, Plaintiff sought a new trial for the *precise* reason, among others, that Defendants had denied her the file which contained Defendants' Exhibit 1 and, such Motion being denied, her appeal was also based in part on such fact. Did these steps on Plaintiff's part before the judgment even permit an *inference* of lack of due diligence?

Then, following the Supreme Court's final rejection of such appeal, still lacking (because of Defendants' *continuing* fraud) sufficient evidence to support a new action, Plaintiff served a subpoena for such documents which Defendants successfully quashed, Plaintiff *then* filed the

Petition in Patel II based "on information and belief", because she *still* lacked sufficient evidence to make such allegations outright. No court in any American jurisdiction has ever suggested that such facts could even *approach* supporting a conclusion that Plaintiff had failed to proceed with sufficient due diligence in these circumstances.[3]

Here, Defendants relied on a combination of deliberate surprise (failing to reveal their intention to offer Exhibit 1 prior to trial at all), fraud on Plaintiff (deliberately concealing from her and the undersigned, after being expressly asked to do so, the remaining contents of the document of which their Exhibit 1 was but a small part) and fraud on the Court to effectuate their plan to use their Exhibit 1 at all. Did Plaintiff have a duty to be diligent to protect against previously-unannounced

---

[3] Even the dissenting Justices in *Hazel-Atlas*, discussed above, stated there was sufficient evidence to support the moving party in that case filing its case in the proper court notwithstanding the fact that that party was fully knowlegeable and had had clear evidence of the frauds on the Court involved in the earlier case therein over 12 years *prior* to filing its proceedings to vacate such case, such party had actually reached a settlement agreement with the defrauding party notwithstanding such fraud and, accordingly, arguably benefitted from such fraud sufficiently as to have had truly unclean hands. The majority in *Hazel-Atlas*, of course, found even such facts indicating probable laches, unclean hands, statute of limitations problems and doubtful outcome-determinativeness *legally insufficient* to raise even a fact dispute to prevent the invalidation of the judgment contained therein because it was, like the judgment here, obtained by a carefully-calculated fraud effected with the active complicity of the defrauding parties' attorney.

deception and trickery by the opposing party's attorney? The Court's Opinion strains the facts beyond any credible breaking point to find even an arguable basis for the Court *inferring* a lack of due diligence on the Plaintiff's part. *Only* if Plaintiff had a duty to anticipate and fully investigate surprise fraud by opposing counsel could her actions even arguably be deemed less than diligent.

Moreover, even if, *arguendo*, this Court has any residual doubts about Plaintiff's due diligence in investigating the fraud, since it is clear that no such duty of investigation of an opposing party's *attorneys'* representations existed *prior* to this Court's Opinion, such ruling should, at most, be made effective *prospectively* since Plaintiff could have had no prior notice of such obligation. *See*, most recently, *McDaneld v. Lynn Hickey Dodge, Inc.*, 1999 OK 30 ¶¶11-14 ("due process calls for adequate notice to a party whose rights may be adversely affected by judicial action.").

It is significant in this regard that this Court nowhere questions the accuracy of Judge Wiseman's explicit findings of fact in her ruling, including her finding that *she herself* was defrauded by Mr. Henry's deliberate falsehoods, which in turn resulted in her issuing a ruling which had the effect of misleading the jury "on the precise point" for which Defendants' Exhibit 1 was offered. That exhibit was also used by Defendants to impeach Plaintiff's credibility. Moreover, Plaintiff was deprived by Defendants of the *knowledge of Defendants' frauds* themselves, which she could, in turn, have *further* used to impeach Defendants' credibility and to challenge their view of their entire case. *Warner Barnes and Co. v. Kokosai*

Kisen Kubushiki Kaisha, 102 F.2d 452, 453 (2nd Cir. 1939).[4] Accordingly, it is clear that the evidence before Judge Wiseman was more than sufficient to sustain a finding by her that there was not only a substantial likelihood that the jury's decision was affected by Defendants' and their attorneys' fraud but, indeed, that it is highly probable, indeed virtually certain, that had she and the jury known of both the true facts concerning Defendants' Exhibit I *and* the fact of Defendants' fraud itself such would, indeed, have been outcome-determinative in Plaintiff's favor.

Respectfully submitted,

/s/

Clifford N. Ribner, OBA 7535
320 S. Boston, Suite 1130
Tulsa, OK 74103
(918) 582-9200

---

[4] As Judge Learned Hand explained: "When a party is once found to be fabricating or supressing documents, the natural, indeed, the *inevitable* conclusion is that he has something to conceal, and is conscious of guilt." *Warner Barnes and Co.*, 102 F.2d at 453. *Accord, Harrill v. Penn*, 134 Okla. 259, 73 P.235 (Okla. 1927) (party *entitled to jury instructions* – presumptions – when opposing party willfully destroyed or supressed evidence to effect that such evidence, if produced, "would be injurious to the one who has thus hindered the investigation of the facts. . . . " [Syllabus by the Court], *and* that "such conduct may be justly construed as an indication of his consciousness that his case or defense is lacking in merit . . . " 273 P. At 235, 237.

CERTIFICATE OF SERVICE

I, Clifford N. Ribner, hereby certify that on the 14th day of May, 1999, 1 caused a true and correct copy of the above and foregoing instrument to be deposited in the U.S. Mail, First class Postage fully prepaid thereon to the following:

Larry D. Henry
Vivian C. Hale
Gable & Gotwels
1000 OneOak Building
100 West Fifth
Tulsa, OK 74103

Honorable Jane P. Wiseman
District Court Judge
500 South Denver
Tulsa, OK 74103

Tulsa County Court Clerk
500 S. Denver
Tulsa, OK 74103

/s/
Clifford N. Ribner